UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Criminal Action
v.	)	No. 01-10384-MLW
GARY LEE SAMPSON,	)	
Defendant.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT COURT JUDGE

HEARING

Wednesday, February 18, 2015
10:04 a.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

(Deputy Clerk Hohler called case to order.)

THE COURT: Good morning. Would counsel please identify themselves for the Court and for the record.

MR. HAFER: Yes, Your Honor. For the United States, Assistant U.S. Attorney Zach Hafer, Dustin Chao, Mark Quinlivan, and DOJ trial attorney, Michael Warbel.

MS. RECER: Good morning, Your Honor. For Gary Sampson, Danalynn Recer, Michael Burt, William McDaniels and Jennifer Wicht.

10:04

THE COURT: For the reasons explained in my February 5 memorandum and order concerning appointment of additional learned counsel, Mr. Burt has been appointed as an additional lawyer for Mr. Sampson. In essence, concerns I at least had about Ms. Recer's health, and other things, caused me to be persuaded that adding Mr. Burt to the defense team would best assure our ability to go to trial in September as scheduled and have that proceeding be both fair and final.

So Mr. Burt, I allowed your motion to appear pro hac vice. As I'll have occasion to describe eventually, one of the things that all the lawyers who aren't members of the bar of this court have certified in being admitted is that they are familiar with the local rules of the court. That includes local Rule 7.1 with regard to the prerequisites for filing motions, although the government has overlooked one of them,

10:05

too, but we'll get to it.

With regard to the agenda, I have the following matters. I want to start by addressing the disputes concerning the schedule leading up to the trial. It's my understanding that the Bureau of Prisons discovery and so-called botched execution discovery issues have been resolved by the parties, at least for now.

I do want to hear argument on the motion to dismiss for failure to inform the grand jury of the consequences of special findings and other alleged errors. There are three other motions, and I know Mr. Warbel has been anxious to argue. But I don't think, if argument is needed, it's going to be today, but I believe those are failure to include the non-statutory aggravating factors in the indictment, number 1450; the contention that the statute is unconstitutional because it doesn't require proof beyond a reasonable doubt that the death penalty is the most appropriate punishment, and it is unconstitutional not to exempt the defendants with severe mental disorders at the time of offense from eligibility for the death sentence.

Then there's the government's motion to present victim impact evidence from the Whitney family. The defendant, Mr. Sampson, responded to that yesterday. The government's reply is due on February 25.

The defendant also filed yesterday a motion for leave

to file a substantive motion asking the Court to correct Mr. Sampson's sentencing, exercise its equitable power under Section 2255 to sentence Mr. Sampson to something less than death. As I said, that was filed yesterday. It's also discussed substantially in the response to the victim impact motion.

There are issues or matters relating to the firewalled Assistant United States Attorneys and the Rule 12.2 notice that I'll have to discuss with defense counsel and the firewalled AUSAs, and there's some budget and voucher questions.

Is there anything else that ought to be on the agenda?

MR. HAFER: Not from us, Your Honor.

MS. RECER: Not from the defense, Your Honor.

THE COURT: All right. Then let's move to the issues concerning the schedule. The parties responded to the schedule that I tentatively proposed in the February 6, 2015 order. While I think I understand them, I'd like to hear the parties explain their areas of agreement and disagreement. And then once those areas are identified, I'll hear the defendant's argument that the Court lacks the authority to order the disclosure pretrial of witnesses and mitigating factors and whatever else the contention is.

In general, I don't, at the moment, find it persuasive, but I want to make sure I understand what's at stake and what the argument is. So would somebody like to try

to explain what the parties have agreed on and what's in dispute?

MR. HAFER: I don't think I'm the person to do that, Judge. I'm having a hard time figuring it out.

THE COURT: I agree. Reading the papers, it seemed to me the following -- then I would like to hear from the defendant or from Mr. Sampson. It seems to me that the parties are in agreement that by April 24, the government -- I should issue an order that requires the government to file its trial brief and provide the defendant an opportunity to do that, to require the parties file their proposed jury instructions, require the defendant file his Rule 16(b)1.1(C) non-rule 12.2 expert disclosures on the assumption that the government has already disclosed its experts.

It appears to me from the submissions that there's disagreement as to whether I can or should order the defendant to disclose the evidence he proposes to introduce in his case-in-chief, to which the government may object. Sampson also contends the Court lacks the authority to require disclosure of mitigating factors. He objects to all non-expert disclosures required by Rule 16, I think, particularly having to disclose the documents he intends to use in his case-in-chief.

He seems to be contending that he's also not required to provide reports of examinations and tests by non-Rule 12.2

witnesses, that he's not obliged to disclose a witness list. So basically, I'm interested in hearing, one, whether I've identified or discerned the defendant's position correctly; two, hear some argument on it; and three, if, as is my tentative view that I have the authority to order disclosure of a witness list, mitigating factors, certain other things, when that should be, if not on the schedule that I tentatively have proposed.

So who would like to speak to this for Mr. Sampson?

10:14 MS. RECER: I think that both Mr. Burt and I will each address a point. For me, Your Honor, just very briefly, I think that the outline of the agreement is ripe. I would point out that the agreement as to the motions in limine and jury instructions is what was then known to the parties, and we talked about proposing that there would be some language that there was a good effort to raise what was known to the parties at the time but that there be some language that can be supplemented later, or something to that effect.

THE COURT: Just take a step back. And Mr. Burt

10:15 wasn't here. We discussed this at the last hearing, and there was a tension in Mr. Sampson's position at that time. On one hand you were arguing that all motions in limine should be decided before jury selection, and I actually agree, continue to agree that that's desirable. Among other things, it's going to shape the questions on the jury questionnaire or influence

them. So that was one principle.

On the other hand, you know, I recognize preparing for trial is an evolutionary process and it may be that certain things are not known in April that are known in August. So I'd have to look at my order. You pointed out there was some lack of symmetry in some of the language, but the principle is the same, as I said last time. If as many potentially disputed issues are identified, say, in late April, and there are motions in limine, brief, going into by early June, we can 10:16 start on them then. I can put my law clerks to work on them when I'm away in July. They can be decided in August, any that are open. And, you know, then we would move to jury selection.

And in fact, it's my present sense that I would order, if there's a dispute, that the mitigating factors and the witnesses who have to be on the jury questionnaire -- you can't have a juror who is related to one of the witnesses -- you know, be disclosed by the defendant in early August when we get to work, I expect, on the jury questionnaire but not later than that.

10:17 Anyway, that's some of my tentative thinking. I don't how that --

MS. RECER: I think that's consistent with the point that we discussed, so I don't think we have an objection to that.

THE COURT: So you don't have -- what my order -- if I

issue an order consistent with my February 6 order, I would be directing Mr. Sampson to disclose the evidence by April 24, disclose the evidence he proposes to introduce in his case-in-chief to which the government may object so that any objections may be addressed in motions in limine prior to jury selection.

And I would clarify that, you know, if information is developed after that date or recognized to be important after that date, you know, the defendant could give later notice, and it may be a proper basis for later motions in limine.

MS. RECER: Yes. And I didn't mean to address the second issue as to the disclosure of the evidence. I was just speaking about the motions. Yes, Your Honor.

THE COURT: You were just talking about what?

MS. RECER: Just the motions in limine deadline, not the evidence deadline.

THE COURT: Well, the disclosure of evidence is -- of some evidence at least, is a predicate for the motions in limine, in my view. And I've now studied this in a way that I hadn't two weeks ago and in fact hadn't in 30 years. I'm satisfied that the defendant doesn't have a Fifth Amendment right, that's *Williams*, not to disclose -- not to be ordered to disclose certain things before trial.

I don't at the moment find that there's any federal statute, federal rule or local rule that prohibits, for

example, disclosure of mitigating factors. I am a little -- there may be certain areas of evidence that I should order if the government -- I'll need the government to confirm or clarify whether it thinks it can use certain disclosures in its case-in-chief. I guess I'm not -- if I do have the authority, which I believe I do, to issue, to require, for example, disclosure of mitigating factors, then there's a question of when.

But did you say Mr. Burt wanted to address some of this?

MS. RECER: As to the content, yes, Your Honor.

THE COURT: The first thing I need to do is understand Mr. Sampson's position on these particular points and then the reasons for them.

MR. BURT: Good morning, Your Honor. I will focus on our position in regard to the case-in-chief disclosures and the notice of mitigating factors. Those are the two primary disputes as far as we can see.

THE COURT: Let me just take -- I'd like to have clarity and hopefully agreement on as much as possible. Is Mr. Sampson going to be objecting to having to disclose, say, his witnesses in August?

MR. BURT: No, because we agree with the Court that that information has to be in the jury questionnaire.

THE COURT: Okay. All right. Then we can get to the

Court's authority, and I've studied what you submitted. But my view is, for example, mitigating factors. Last time his mental condition or drug use were issues in the case. As I recall -- I'm confident correctly -- there were questions on the written questionnaire about whether the potential juror had experience directly or through people close to him or her with mental illness or drug abuse. And some people were disqualified from serving because they had experiences that were close to, foreseeably, what would be in the evidence. And we're doing this in part because a perjurious juror didn't answer some of those questions correctly.

Anyway, that's why, in addition to thinking I have the power to do it, I feel I should order the disclosure of mitigating factors. But go ahead. I actually do want to hear from you.

MR. BURT: I'll start with the case-in-chief disclosures. Based on my experience, I've never seen this issue come up before. A similar issue has come up in most of the federal cases involving the sufficiency of the government's notice of aggravating factors.

And typically the defense has come in with the position that the notice is insufficient, that it should be more detailed in the way of an offer of proof. The government's position has always been, in response to that type of litigation, that the government is never required to

disclose evidentiary detail. And as far as I know, the courts have uniformly held that that in fact is true.

So the notice of aggravating factors, that the government is required under the statute to provide, has typically not involved evidentiary detail. And I have not seen any Court order the defense to disclose a summary of the actual evidence that's being offered in the case-in-chief.

THE COURT: Well, there are a couple of things. First, your colleagues are very interested in what other courts have done. But the fact that nobody else has ever done it is not the end of the inquiry for me.

MR. BURT: I understand.

THE COURT: And I actually see the grand jury matter -- well, we'll get to it. So that's one.

Two, the case-in-chief, putting aside for a moment whether I have the authority, the Court has the authority, that's the area of the greatest concern to me. But as I said, Mr. Sampson's position up to now has been that he wants essentially to have the motions in limine decided before jury selection. And this is what I try to do in every case, to the maximum extent possible when there are foreseeable issues, so the defense and the government can devise a strategy, have as reliable a sense as possible of what evidence they'll be able to get in and not come up, you know, after the openings or before the jury instructions and say, Well, my whole defense

was depending on getting this evidence in, and now we haven't gotten the evidence in. That's not fair. Same thing with the jury instructions which frames the evidentiary rulings.

MR. BURT: Yes. And I appreciate the Court's concern. And I think in the last four cases I have seen the capital case unit file an omnibus motion to challenge specific categories of mitigating evidence. That type of motion has not depended upon the specific mitigators being alleged, except in a very general way, but it has raised for the Court's decision categories that the Department of Justice feels are not proper mitigation.

I'll give the Court some examples. Typically these motions involve motions to exclude evidence concerning lingering doubt or motions to exclude evidence concerning the impact of the execution on the defendant's family. And we provided to the Court in our response a typical -- one of these motions. That type of litigation could go forward at any point because it's a set piece that the Department is advancing. There's certainly nothing that is dependent upon our notice of mitigating factors that holds that litigation up.

And I also point out to the Court that the government does have, from the first trial, a general sense of what the mitigators are because they were provided with those mitigators by Mr. Ruhnke. So they're not completely in the dark in terms of where the defense is going; and they certainly are in a position, it's our view, to come forward with mitigating their

motion to exclude mitigating factors.

So in terms of the Court's concern that unless we have a detailed disclosure of mitigating factors or the case-in-chief for that matter, we're not going to be able to litigate issues, I am not sure that that's the case.

THE COURT: Well, you run into two -- there are at least -- well, one, it also occurred to me that we have the first trial, and while there may be additional or different mitigating factors, some of them are known. And it has come into sharper focus. This was an issue embedded in the botched execution dispute that I should decide and rule upon the definition of a mitigating factor, whether it's limited to what's in the statute essentially and what the statute codifies are constitutional requirements, which I think is, basically, the history and characteristics of the defendant and certain things relating to the offense but not something like the risk of botched executions. That's the government's view, I think, that's not a mitigating factor. So I think we could litigate those.

10:28 Hold on just a second. Why don't you keep going.

MR. BURT: I think one of the Court's orders references the *McCleskey* definition of mitigation, which is anything the defendant offers as a basis for a sentence less than death. And that's been the tension in these cases. The government saying, No, that's not what mitigation means. It

really has to relate to the character and background of the defendant.

THE COURT: That's exactly what I was talking about. And I may have been wrong in just extracting that line from *McCleskey*, but that can be -- I agree that could be decided without disclosure of specific factors. I continue to be concerned about fashioning an appropriate jury questionnaire, you know, without knowing exactly what mitigating factors are going to be alleged.

10:29 MR. BURT: And we do think that is a legitimate concern. We have set forth an argument, and I hear the Court saying you're not persuaded by that argument, that you don't have the authority.

THE COURT: Well, you can explain it to me.

MR. BURT: Well, both in relation to the case-in-chief issue and the mitigating factors, the argument is simply that there's certainly nothing in the rules or in the death penalty statute which authorizes that. And in regard to the notice of aggravating factors, we have a specific statute that covers

10:30 that topic.

THE COURT: I'm sorry. Notice of aggravating factors.

MR. BURT: In other words, the 3593(a) has a provision which requires the government, but not the defense, to provide notice of aggravating factors. Attempts have been made to change that law, and those attempts have failed. And it seemed

to us that that was a persuasive argument that the statute, as it presently existed, does not grant the authority to make those statements.

THE COURT: At the moment it doesn't appear to me to be a persuasive argument because Rule 57(b) recognizes that there's certainly inherent authority in the Court, and it's the inherent authority to manage proceedings in a way that's not inconsistent with any federal statute, federal rule of criminal procedure or local rule.

10:31 So the fact that the statutes and the rules are silent on an issue, it seems to me, to leave the inherent authority in place; and then the question is, you know, what's the appropriate -- is it appropriate to exercise it. Indeed, more specifically -- and I can go through this, because I don't know how much time or opportunity the government has had to do this -- Rule 16 says that defendant has to produce certain reciprocal discovery, but the application note to the rule from 1974 says that's intended to establish a minimum and not to reduce the Court's inherent authority, in effect.

10:32 So to me, the authority exists, and the most problematic area would be with regard to the case-in-chief. And part of the reason -- I didn't write my proposed order directing the defendant to file a trial brief; but saying if you foresee there's going to be litigation over something you want to get into evidence, disclose it so it can be litigated,

because that will serve the purpose of getting you guidance before trial.

We haven't mentioned witness lists yet, or you haven't, mitigating factors, witness lists. At some point I would order an exhibit list for your case-in-chief associated with the witnesses.

What do you see as the -- without conceding, but assuming I have the authority to order all of what I addressed in my proposed order, tentative order, what's the problem with 10:34 requiring Sampson to disclose essentially what he intends to present in his case-in-chief?

MR. BURT: I think the biggest Fifth Amendment problem relates to the fact that the government is going to be producing evidence of unadjudicated criminal activity during the sentencing phase that they have the burden of proving beyond a reasonable doubt.

So if you think about some of the mitigators that come up in relation to that prior unadjudicated criminal activity -- just as an example, a mitigating factor might be the defendant 10:34 acted under duress. He committed the prior offense, but he acted under duress. So implicit in that mitigating factor is an admission by him that he committed that conduct. So you are lightening the government's burden by coming forth before they've had to put on their case-in-chief as to the unadjudicated criminal activity.

THE COURT: And what is -- because this is exactly what I was beginning to hone in on. What is the prejudice? Is the prejudice a concern that the government would seek to admit in its case-in-chief the statement that the defendant said this was a mitigating factor, or is it that the government would have pretrial notice that the defendant might argue duress and that it would have an opportunity to prepare for that?

MR. BURT: I think it's both. I think it lightens their burden and can cause them to shift their emphasis in a way that gives them an advantage they would not otherwise have had the defendant not been required to produce that kind of disclosure.

10:36

THE COURT: But -- I'm sorry. Go ahead.

MR. BURT: I was going to say that I think it's because of those very problems that most of the cases, at least on the mitigating factor disclosures, have ordered that disclosure right on the eve of the trial. Because by that time, the defendant certainly knows what he's going forward with.

10:36

THE COURT: But this case -- one of the -- Mr. Brook, colleague, all these things, testified against the enactment of the statute, and he talked about the Fifth Amendment right or interest that exists before somebody's been found guilty. In this case, Mr. Sampson's pled guilty. We haven't gone back before that. And we are in the penalty phase or the selection

phase.

So the concerns that might ordinarily operate don't operate -- that concern about use in a guilty phase. But I mean, if the government agreed that it's not going to seek to tell the jury that Mr. Sampson has told us before that he acted under duress, or if I exclude that, what's the unfair prejudice?

MR. BURT: There might not be any, depending upon how that remedy is structured. In other words, the Court may have some means to alleviate any problems that might arise.

10:37

THE COURT: Because most of those cases that -- you know, with regard to the government having a chance to investigate, most of the cases you cited found that under the statute, the government does have a right to rebuttal and for that to be meaningful. And for the case not to be interrupted by many and long continuances, it was appropriate to order the disclosure of mitigating factors some reasonable time before the penalty phase.

Mr. Hafer, do you want to be heard -- is there more you'd like to say on this, Mr. Burt?

10:38

MR. BURT: No, Your Honor. Thank you.

MR. HAFER: Briefly, we agree. It's right. It's also right because it facilitates the efficient progress of the litigation. I mean, we don't do boilerplate. We're not going to start filing boilerplate motions to exclude things that may

or may not be identified as mitigators. That's backwards. We should know what they intend the mitigators to be. I have two responses to the claim that we already know. We certainly know what they were in 2003. But ad nauseam, we've been told that the prior defense counsel did a horrific job. We don't agree. That's what they say.

So how helpful are the horrible mitigators that the prior counsel put on? We don't know because they've been telling us since the 2255 that they did a terrible job.

10:39 The second thing I would say --

THE COURT: Let me just pin down some of the implications of that. With regard to the framework that was established tentatively by me after hearing from all of you for the motions in limine, they'd have to identify the mitigators, say, April 24, not August 8, and they haven't argued yet that they're not far enough along to know what any or all of their mitigators are going to be.

But go ahead. So you're arguing for sort of disclosure April 24, not August 8, hypothetically?

10:40 MR. HAFER: Yes, absolutely, Your Honor, especially because, you know, we've looked at the last couple of cases Mr. Burt has done. He's tried to put 150 mitigators in front of the jury, literally. We think that's wildly inappropriate. There were about 17 or 18 that went before this jury the last time.

But if they're even going to attempt that game again, then we need lots of time to streamline this and knock these out because there should not be anywhere near that number of mitigators.

THE COURT: In fact, about a year ago I ordered disclosure of the mitigators, and you got a cut-and-paste version of more than 100.

MR. HAFER: I think it was in that area code, yes, Your Honor. It was about 90.

10:41 And the point is that -- and something Ms. Recer said, and Your Honor discussed this tension earlier -- is they need to be ordered, in our view, to do this by April 24. If there's good cause to add a mitigator or two post-April 24, then of course, then there's good cause and it can be added. But there's this hyphenated word going in the pleadings: "Then-identified," "then-known," "then-aware of." And it's been used to essentially -- so it can't be that you order these mitigators disclosed by April 24, and on April 24 they disclose two or some very generic disclosure and say, "That's what we 10:41 know today, April 24," and over the next three or four months, we get inundated with tens and tens and tens of additional mitigators.

They have an idea of what their case is. And as you said, 57(b) provides you with authority that is not taken away anywhere in 3593, and it facilitates the efficient presentation

of this case. And, and, I might add, it's not like we're playing hide the ball here on our case.

First off, as I've said numerous times, they have a roadmap to our case, more than a roadmap. You've also ordered us to file our trial briefs.

THE COURT: Okay. Let's spell this out because Mr. Burt is here, and I think I understand you, but let me see if I do.

First of all, you filed a detailed -- the government
10:42 filed a detailed trial brief, as I recall, in 2003, correct?

MR. HAFER: Yes, Your Honor.

THE COURT: And I believe you said at the last hearing or in December you said, when you had a deadline for a trial brief, you were going to file essentially the same trial brief.

MR. HAFER: Expanding on -- noting a couple of areas of difference, dead witness who would be replaced with, providing in detail the Terre Haute case, for example, but yes.

THE COURT: So basically the new part would be what's happened in the last ten years?

10:43 MR. HAFER: Yes, Your Honor.

THE COURT: So you have a trial brief, and then you have the trial.

MR. HAFER: Right.

THE COURT: And you've said that it's your present intention to put on, say, the same experts and essentially the

same case, plus evidence of dangerousness in Terre Haute?

MR. HAFER: Correct, Your Honor. And there was one where there's a substantive difference in the expert under Rule 16. We did a detailed disclosure on that as per your order last October. We provided an updated notice. One of the medical examiners is deceased, and yet, we're happy to file a trial brief on April 24 where we will explain, you know, for example, there's a handful of witnesses who are no longer available either due to death or incapacity of some other type and explain that.

10:44

THE COURT: And then you would say you propose to use their testimony from the first trial, and if they wanted to challenge whether that's hearsay or admissible under the unavailable witness exception, they could do that.

MR. HAFER: Correct. There are some witnesses, exactly, Your Honor, that we might say, Here we're not looking necessarily for a substitute witness. We're looking to do a read-in. It's prior sworn testimony tested by cross-examination. Therefore, it's admissible for the truth, even though the rules of evidence don't apply. There will be other cases where we might say, This witness is deceased. We intend to call this witness in lieu of that witness. This witness has dementia, so we intend to call this witness instead of that witness. Or, we say, We propose doing a read-in of the prior testimony. All that stuff, we intend to describe in

10:44

detail in the April 24 filing.

THE COURT: So to the extent that Mr. Burt's recent experience in other cases in other jurisdictions has been that the government won't give any detail about the aggravators, you intend to include a reasonable level of detail in the trial brief, and there's the record of the 2003 trial.

MR. HAFER: That's exactly right, Your Honor.

THE COURT: So to the extent I have some inherent power and I'm looking for the equitable way to exercise it, I think you're arguing the fact that the government is making full disclosure, substantial disclosure, should influence me to order the government -- Sampson to make more disclosure than might be appropriate in a different case?

MR. HAFER: That's right, Your Honor. It's, A, that you have the authority to do this; B, this will facilitate the progress of this litigation in a way that doesn't prejudice anyone; and C, certainly it's been the approach that the government has taken on its own and that you've ordered us to undertake by filing a trial brief. We didn't stand -- if you read the '03 trial brief, and it will be the same here, we're putting it out there. There's not going to be any surprises from our end. Despite the fact that we have been told ad nauseam that there shouldn't be any surprises from either end, we continue to get resistance to any type of substantive disclosures.

But we -- it is not going to impact how we proceed. There will be no surprises. We've produced all the *Jencks* in our possession. We've produced the trial transcripts. We will continue to put our case out in the open.

THE COURT: We're not there yet. I've put aside the *Jencks* issue, 26.2 issues, but we'll get to them shortly.

Well, Mr. Burt, is there the prospect that there will be 75 or 100 mitigators proposed in this case?

MR. BURT: I don't think I'm deep enough into it to be able to answer that question, but I can state to the Court that, generally, the trend in more recent cases, not just mine but others as well, has been to break down the number of mitigators and offer as many as possible. The reason for that is to avoid the kind of 2255 attacks that occur down the line if counsel doesn't offer every piece of mitigating evidence that is available.

So we're not trying to burden the jury or the Court. We're trying to do our job here. And so yes, there will be a number of mitigators, and the fact that the government has looked at these other cases indicates to me they know generally the kinds of things that will be offered in mitigation. And from the experience of other cases, they have used that knowledge to their advantage to file these in limine motions, however you designate them, boilerplate or not, raising the issues about the proper scope of mitigation.

THE COURT: Let me go back to Mr. Hafer. I meant to ask you this. Does the government contemplate seeking to use any of these statements by Sampson's counsel in its case-in-chief?

MR. HAFER: No.

THE COURT: So would you be agreeable to an order that prohibited that, that you just use it to prepare your case to essentially rebut?

MR. HAFER: Correct, yes. With, you know, I would --

10:48 yes. The short answer is yes. I would think we would have some standard interest of justice exception if something came up that was, you know, the standard letter and language in a proffer agreement or something like that. But other than that, yes, we wouldn't have any interest in using it in our case-in-chief.

And I don't know why we would start by guessing what the mitigators are and filing to exclude things. And I would say the trend -- just so it's clear, Your Honor, the trend among the anti-death penalty defense bar is to flood the Court

10:49 with mitigators. It's not accurate to say the trend among the verdict forms is to submit hundreds of mitigators to the jury.

Very similar litigation just occurred a year and a half ago in the Eastern District of New York in the Ronell Wilson sentencing retrial in Brooklyn. That judge, Judge Garaufis, excluded and consolidated huge numbers of mitigators.

So the notion that it's being done, by the way -- and I have to comment on this. The notion that it's being done to make a cleaner 2255, that's not credible. That's not why it's being done. It's being done to create confusion.

If you look at some of these things on some of these other verdict forms, it's -- and that's something I do want to respond to because it did come up in the Whitney motion, and I can do it later, Judge, or I can do it now.

THE COURT: We're going to do the Whitney motion separately, but if it's relevant to this, you can say something about it.

MR. HAFER: This constant refrain about, we have to do what they say or there's going to be a 2255; we have to do everything they say, or there's going to be a 2255, it's getting tiresome. They stuck in the Whitney motion, which half of which has nothing to do --

THE COURT: We're going to get to that.

MR. HAFER: Okay. I'll wait. The point is, by requiring disclosure of the mitigators, Your Honor, you can facilitate informed challenges to the mitigators prior to trial which, therefore, they need to be baked into the questionnaire.

If they're going to be putting on, for example, that he has hepatitis C or if they want to put on something that he has hepatitis C as a mitigating factor and there are potential jurors who lost family members to hepatitis C, well, we need to

know that.

THE COURT: I'll explain it momentarily, but I'm going to order disclosure of the mitigators. The open issue is are we talking about August or are we talking about April.

And my reaction to the concern about the 2255 was as follows: I think it can -- if you look -- I haven't looked at it recently, but if one looks at the list of mitigators that was filed a year ago, some of which, as I recall, had nothing to do with Mr. Sampson or this case, but if there are, hypothetically, ten mitigators that a jury could reasonably be expected to find and the defendant in the capital case persuaded the judge to give them 75, those ten could be lost. You know, after having found the first 25 are frivolous or 50 of them are frivolous, they might not focus on and give adequate weight to the others because they've been obscured.

I do constantly strive to try to assure things will be fair and final, but sometimes it can be ineffective to not be focused.

MR. BURT: Could I add one thing, Your Honor?

10:52 THE COURT: Sure.

MR. BURT: I understand the Court at this point is focused on when these disclosures would take place.

THE COURT: Actually, putting aside evidence relating to the case-in-chief, I think that presents its own issues, although I do think I have the authority. I'm talking about

witness lists. I'm talking about mitigating factors. I'll be talking about exhibits at some point, former pretrial evidence or disclosure of pretrial evidence, experts. Go ahead.

MR. BURT: I think the Court has the witness lists and the exhibit lists closer in time, or you're contemplating closer in time to trial, and that makes sense to us because that has to be in the jury questionnaires.

The key provision for us on the mitigating factor list is the language you propose in 1(c) of your order 1797,

10:54 "Without prejudice to his right to supplement this disclosure as his preparation for trial progresses." I think that's where the dispute is down the line, if we're trying to anticipate problems. I just heard counsel sort of allude, Well, if they come in with one or two other mitigators that were not in the list, that's what we're trying to avoid because our investigation is going to proceed beyond April, and there's no doubt going to be more than one or two. So as long as there's an understanding that there is a safety valve there, then I think the concern with earlier disclosure could be alleviated.

10:54 But if we're talking about a drop-dead list --

THE COURT: Here. You're getting on a train that's down the track but I'm hoping that its direction is going to change because I expect, like I think my colleagues throughout the country expect, zealous advocacy from both sides in good faith. Emphasize the good faith. You know, if a good faith

effort is made in April to identify what may be the mitigating factors, and then the investigation, which of course will continue, discloses others, I'm not going to say you can have two more or you can have five more but you can't have ten more to propose.

On the other hand -- and there's reason for me to have this concern in this case. You know, if I order April, and there are two, hepatitis C and mental condition, and then in August we found 90 others, you know, I have to exercise my judgment, and it's going to be influenced by the trustworthiness, the credibility of counsel and how hard I'm going to push to have it shown to me, at least ex parte, that this is new.

But ordinarily, I'd be able to rely on the representations of counsel. And I hope -- although I have some problems with that now, manifest in some of the unprecedented orders I've issued, including requiring that motions for relief to file substantive motions be submitted.

This is a useful discussion because it is without prejudice. And I don't think -- you know, if the government gets -- I mean, my inclination, having heard you and Mr. Hafer and done the work I've done, it would be to say that, you know, in April, the defendant should identify the mitigating factors which it in good faith believes it may ask go to the jury without prejudice to the right to supplement the disclosure as

the preparation for trial progresses.

And that will permit the most focused motions in limine to be prepared. And, you know, if you're acting in good faith, I'll understand it. And whatever you come up with later, we'll deal with. It will permit focused consideration and informed decisions.

MR. BURT: Your Honor, there's one aspect of the proposal which the Court is contemplating in a simultaneous filing of what the government has described as a trial brief which will contain a detailed case-in-chief summary at the same time we're being ordered to disclose mitigators. And I'm wondering if the Court would consider ordering the government's disclosure to precede ours so that we're in a position to look at that and assess it before we file the mitigators.

THE COURT: I suspect Mr. Hafer won't have a problem with this because he was prepared to file his trial brief last month.

MR. HAFER: If you want to back us up prior to April 24 on the trial brief to allow that --

THE COURT: I'll put you about a month before.

MR. HAFER: That's fine.

MR. BURT: Thank you.

THE COURT: All right. Actually, let me give Mr. Hafer a chance at least to speak to this, or both parties. With regard -- I believe I have the authority under *Williams* --

and I'm going to describe this in a minute -- to order the disclosure of evidence. I don't at the moment feel comfortable ordering the defendant to file a detailed trial brief. I do want to either order or invite and encourage the disclosure of evidence, as I wrote here, that foreseeably could be the subject of a motion in limine. And since the defendant has an interest in getting guidance, I hope to get that.

But do you want to be heard on that approach?

MR. HAFER: No, Your Honor. We don't have a strong opinion on the trial brief. If you have any concerns, we don't feel that it's necessary to order a trial brief. Again, so long as we get something to facilitate the motions in limine practice, we don't -- we're not pushing asking for a defense trial brief.

THE COURT: Mr. Burt, I am inclined, as I said, to either order -- that's the way the February 6 is written, "shall disclose evidence you can foresee that wouldn't provoke a motion in limine." Do you want to be heard on that?

MR. BURT: I just want to make sure I understand the intent of that paragraph B. Is the Court in that language, when you say, "disclose the evidence he proposes to introduce in the case-in-chief to which the government may object," is the Court contemplating that we would look at our case-in-chief and decide what are the controversial issues here and only be disclosing those?

THE COURT: Yes. Is that okay?

MR. BURT: Okay. Yeah, that's fine. I just want to make sure I was reading that correctly.

THE COURT: It is. And it's only to make this motion in limine process work. I do this in every case. I am very interested in motions in limine. I'm very interested in the proposed jury instructions. I'm very interested in identifying disputes relating to the proposed jury instructions in advance because they frame -- that frequently frames -- provides the
11:01 standards for deciding many motions in limine. Is this relevant? Is it admissible? And once I do that, it permits counsel to develop a strategy based on evidence the jury is likely to hear and not based on, you know, some misconception about what I'm going to allow the jury to hear.

MR. BURT: Makes sense. I think the Court indicated you didn't have a problem with that "without prejudice" language being added.

THE COURT: We absolutely can add the "without prejudice language" because that is the intention.

11:02 MR. HAFER: And the good faith language.

THE COURT: All right. Let me, since the issue is raised by the submissions, and I may actually excerpt this and write something about it or include it in the order, I will note that Mr. Sampson has asserted with regard to the schedule, in writing at least, that the Court does not have the authority

to order the disclosure of evidence the defendant proposes to introduce in his case-in-chief, and certain other things, including mitigating factors. I find that that contention is not correct.

More specifically, I find that the Court has the authority to order the pretrial disclosure of a witness list, mitigating factors, proposed exhibits and evidence that the defendant proposes to use in his case-in-chief, although I'm not going to exercise that authority to its full limits.

11:03 First, the defendant does not have a Fifth Amendment right to remain silent regarding his defense before trial. The Supreme Court decided that in *Williams v. Florida*, 399 U.S. 78 at 85 to 86, when addressing an alibi defense. This has also been discussed in District Court in Puerto Rico in *Catalan-Roman*, 376 F. Supp. 2d 108 at 117. The fact that the defendant does not have a right to remain silent regarding his defense before trial is implicit in the provisions of Federal Rule of Criminal Procedure 16(b)(1), which require disclosure of certain evidence the defendant intends to use in his

11:04 case-in-chief.

In the 1970 -- I think I may have written the year down incorrectly. In the 1974 application note to Rule 16, or Advisory Committee note to Rule 16, the Advisory Committee wrote, "The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not

intended to limit the judge's authority to order broader discovery in appropriate cases," as the Court noted in *Catalan-Roman* at 115.

Rule 57(b) of the Federal Rules of Criminal Procedure also recognizes and codifies the Court's inherent authority by stating that, "A judge may regulate practice in any manner consistent with the federal law, these rules or the local rules of the district." I recognize and exercise such inherent authority to act interstitially in applying the standards of Rule 29 after the first Sampson trial. That is discussed in *Sampson,* 335 F. Supp. 2d at 200 and also in *Catalan-Roman,* 376 F. 2d at 115 which cites *Sampson*.

There is no federal statute, federal rule or local rule that addresses whether or when a defendant can be required to disclose witnesses, exhibits, other evidence or mitigating factors: In 2007, that Congress did not enact proposed legislation that would have required disclosure of mitigating factors before the guilt phase of a capital case. However, the failure to act does not limit the Court's inherent authority as a statute would, particularly in this case where the defendant has pled guilty and the parties are preparing for a sentencing phase.

18 United States Code, Section 3432 requires the government to provide a capital defendant notice of its witnesses at least three days before trial. This does not --

the language itself is "at least three days before trial." It communicates that a Court may order earlier disclosure. It just prohibits a Court from authorizing later disclosure.

The statute is silent with regard to disclosure of witnesses by a defendant. Ordering pretrial disclosure of witnesses by a defendant would not conflict with this statute. Most courts have held that judges have the authority to order the disclosure of mitigating factors and witnesses before the penalty phase of a trial to make the government's right to rebuttal under 18 United States Code, Section 3593(c) meaningful.

Judge O'Toole did that in *Tsarnaev*, 2014 Westlaw 4823882 at page 5. He required the disclosure of mitigating factors three weeks before trial, basically three weeks before jury selection, and witnesses as well.

In *Wilson*, 493 F. Supp. 2d 464, at 465 to 66, the District Court of the Eastern District of New York required disclosure of mitigating factors four days after the beginning of the guilt phase, and what *Sampson* characterizes as *Lujan*, disclosure of mitigating factors -- well, the decision was issued one week before the penalty phase began and required disclosure on or before the beginning of the penalty phase.

Catalan-Roman, 376 F. Supp. 2d at 11, the Court required disclosure of non-mental health mitigating evidence a week after the penalty phase began. The only contrary decision

cited by *Sampson* is a magistrate's decision, *Umana*.

So I find that I have the authority and that it's appropriate to exercise it to require disclosure of mitigating factors and the defendant's witnesses prior to the submission of the jury questionnaire. I'm going to require the disclosure of the mitigating factors, which in good faith are known to the defendant, on about April 24, without prejudice to the right to supplement that as investigation evolves.

That's information that's necessary to select the jury and to permit the motions in limine that we've discussed. It will also give the government reasonable time to prepare rebuttal. I am also, with the agreement of the defendant, going to order the disclosure of evidence that he proposes to introduce in his case-in-chief to which the government may object so that any objection may be addressed in motions in limine and decided before jury selection. I'm going to make that April 24.

Also, as was just agreed, as I understand it, but it is without prejudice to supplementation as investigation by the defendant proceeds. I will set a date for the disclosure of the witnesses, too. It may be altered, but I'm going to place that for both parties in August, mid-August. And I will, in the future, set a date for the submissions of exhibits that the party proposes to use in his or its case-in-chief.

Basically, it's been confirmed today what Ms. Recer

said on February 4, 2015. It's in the interests of the defendant to have motions in limine, regarding proposed mitigating factors or evidence that foreseeably the government will assert is not admissible, decided before jury selection. So I am going to use that April 24 date to trigger a process that will get those motions fully briefed by early June.

There was one other issue raised by the response to the proposed schedule, and I'd like to clarify the defendant's position. The defendant, Mr. Sampson, stated that he would produce witness statements in the manner required by Rule 26.2. 26.2 basically provides for the disclosure of witness statements which are defined in the same way that they're defined in Section 3500 after the witness testifies.

It's been the practice for a long time in the District of Massachusetts in almost every case, including this case, for the government to expansively define witness statements to include, for example, FBI reports that may not have been signed or seen and adopted by the defendant and for the defense, in return for getting those before the government's witness testifies, to agree that it will provide any witness statements which it usually defines in the way the rule defines them, something signed by the witness or adopted by the witness early as well.

So I think it should -- and the standard pretrial order, I don't understand that I have the authority to order

the government to do what it's been doing in this case, which is turn over reports that are not witness statements as defined in 3500 and 26.2. But I encourage it in part because they do have an obligation to turn over any material exculpatory information in a witness state, and they can do it by turning over the statement, or they can do it by reliably summarizing it, which is risky business.

But what's Mr. Sampson's position? I want to make sure the government understands it. Because if Mr. Sampson,

11:15 you know, even if he gets a signed statement from a witness, doesn't intend to turn it over until the witness testifies, the government should know that and it can consider whether it wants to continue voluntarily, which is what it's been doing so far, giving the defense all the detailed information it's been given.

MS. RECER: I think -- the position as to witness statements that were signed, that those could be disclosed earlier. The concern is the definition of the statements, and we don't disagree that the -- if it's a signed written

11:16 statement.

THE COURT: It's not just -- again, I just want to make sure. I was talking shorthand. There are about four ways under 26.2 and 3500 that a document could be a witness statement. So it's all of those.

MS. RECER: By that -- yes, by the definition -- if

that's the definition, we don't have a problem with early disclosure of that, with the caveat that there are some declarations which are under the protective order, which will obviously be different. But as to any other statements that fit that definition, then we agree to that.

THE COURT: 26.2(f) defines statement for those purposes. I believe it's verbatim, the same as the *Jencks* Act, 3500. So I think there are two issues. I mean, the government has been turning over more than that.

11:17 MR. HAFER: Yes.

THE COURT: Which I think is in the interest of justice and minimizes the risk of any *Brady* issues. But do you have any questions about this, Mr. Hafer?

MR. HAFER: You know --

THE COURT: Then there's going to be a question of by what date.

MR. HAFER: I guess that was my first question. And so long as it's clear that, you know, there's no -- and I don't, you know -- whatever. I don't like to do this, but I

11:18 want to make sure there's no parsing going on that we're going to get statements made to defense investigators, defense attorneys, the same way Mr. Chao and I go and interview a witness, and he or she says something to us, we turn it over.

THE COURT: Yeah. No. This is what I'm trying to tease out. That's not what I'm hearing. This is a subtlety,

but this is what I discerned the issue was. I haven't read cases recently.

What you've been turning over is more than what 3500 and 26.2(f) define as a witness statement. Because if you make a memo of -- you know, if an FBI agent does a 302 report, so it includes some of what the person said but it isn't substantially verbatim and the witness, prospective witness has never seen it and adopted it by signing it or saying, Yes, that's accurate, it's my understanding your memos, the 302, are not *Jencks* statements of the person being interviewed. They'd be a *Jencks* statement of the agent if the agent was testifying.

So you've been, by agreement, turning over more than is required. I don't know what you get in a drug case or something, but you probably don't get much because the defendants are saying, We don't have any witness statements. They don't have grand jury transcripts. They don't have anything their prospective witness has signed, although they probably made memos of what the witness told them.

MR. HAFER: Correct. In a drug case, that's correct. But that's not what this case is. We know that they're interviewing witnesses, developing evidence. And, you know, as long as it's clear and they want to take the position in court -- I just -- I wish we could just -- maybe it's a small point, but it's the sanctimony that's really starting to bother me.

THE COURT: No --

MR. HAFER: No, but Judge, it's, Oh, they told us something, but if it's not written, we don't have to give it to you. I mean, come on. What is the game here? What is the game?

THE COURT: First of all, it's not a game. Don't get me going. I have an hour-and-15-minute talk I've given to many law schools. The law is not a game, and you know that. The rules -- and this is why I'm going to it, because I don't want you to feel sandbagged.

11:20

MR. HAFER: Here is my concern. I'm not trying to be glib --

THE COURT: You're not, no. But this is why I'm teasing this out. I don't want you to feel sandbagged, and I want to know what's agreed to. The standard pretrial order which I wrote 25 years ago for the court or something, 20 years ago, it says with the agreement of the parties, you know, 3500 statements will be exchanged or 26.2 statements will be exchanged by X date. And it's different than the rest because

11:21

I think I have no authority to require something that's defined as a statement in the rule and statute before the witness actually testifies.

Now we're talking, though, about something different. You've, in my understanding -- the U.S. Attorney's office generally turns over more than is required if you turned over

just what is required by 26.2, and 3500. You turn over more. You might have to turn that over because it includes material exculpatory information, and that constitutional requirement trumps the statute and the rule.

But what I heard Ms. Recer saying is, you know, if we ever ask a witness to sign a statement, we'll turn it over. And she's communicating to me, although maybe not immediately to you, that if their investigator talks to a witness, doesn't write down a substantially verbatim account but writes down the highlights and doesn't show it to the witness, she's not going to give it to you.

11:22

MR. HAFER: All right. Just so it's clear, if they interview a witness -- and let's say they're attempting to develop this bad childhood evidence, and they interview a witness who says, I never saw Gary Sampson's father lay a finger on Gary Sampson, and nobody writes it down, they have no obligation to turn that over to us, and they can, in fact, affirmatively put on evidence to the contrary of that?

THE COURT: Well, I think the answer is that the obligation under *Brady* -- the short answer is that's my understanding, because the government has a duty to turn over material exculpatory information but the defendant doesn't have a duty to turn over material inculpatory information.

11:23

MR. HAFER: But it's not inculpatory if it's impeachment of a witness. If they're putting a witness on the

stand that they believe has knowledge of a fact that they're eliciting evidence on -- I just want to be clear. This is what I'm fleshing out because then it's going to affect how we prepare our cross-examinations -- and if the ultimate ruling here is that we get a lot of rope to cross these people on, When did you meet with them, What did they tell you, Did you see what they wrote down, I mean --

THE COURT: Well, you do have that. If there's no privilege, you do. But maybe I ought to hear from the defendants.

MR. HAFER: I understand very much what you're saying about 26.2. I understand what you're saying about 3500. We do, as an office, take the position that the Court does not have the authority; but in most cases well in advance of trial, 21 days, what is typically referred to, sometimes in a case like this, it's years in advance of a trial, we turn it over.

But I just want to make sure that we all, Mr. Chao and I especially, understand the ground rules for when they interview people so that we can make discovery requests and that sort of thing, if necessary. If we feel that there might be someone who said something that didn't make it in the declaration, we think that that goes to credibility, bias, any sorts of other things like that, and we want to have the ability to probe on that.

THE COURT: Well, that's -- trying to get this

clarified for you.

MS. RECER: I believe the Court correctly understood our position, I mean, that we do not have a *Brady* obligation, the government has the burden, and that we would turn over statements that fit the definition.

THE COURT: But in those circumstances -- I'll write an order that says, "By agreement the parties will turn over," early -- and I'll set a date, probably like in August, we can talk about the date, you know -- "statements as defined in Rule 26.2(f)."

Now, the government is, under that order, permitted, I would say encouraged to continue to do what it's been doing, giving you more than documents that fit the definition of 26.2(f), but it's not ordered to. And if they decide they don't want to do it anymore, my present sense is, absent a reciprocal agreement with you, I don't have the authority to order them to keep giving you as much as you've been getting. So I think that's where it is.

What's an appropriate date for the defendant to disclose his witness statement? I have in mind now, as I say, July or something, early August.

MS. RECER: Your Honor, is it going to be a staggered disclosure where the government would have one day and we would have a subsequent day?

THE COURT: The government is doing it.

MS. RECER: Okay. You just proposed July. I don't think that we have an objection to that.

MR. HAFER: That's fine, Your Honor. And I guess one other clarification that occurs to me is, obviously notes, a mitigation specialist, for example, they intend to put on interviews of a number of people, his or her notes seem to me to fit right squarely --

THE COURT: This is a valuable discussion. But as far as I know, there's nothing unique to a capital case about this. So Mr. McDaniels, Mr. Burt, Ms. Wicht, yes, if a mitigation specialist as a witness took the notes, the notes are 26.2(f) statement of that witness, the mitigation specialist. If the notes are of an interview with a third party and the third party testifies, those notes are not a statement of the third party unless the third party adopted them in some way by signing or reading and saying, "Yes, that's what I told you." Okay?

MS. RECER: That's precisely my understanding, yes.

THE COURT: I guess I would say the government so far has been turning over more than I'll be ordering. If you change that generally or for specific witnesses, I think it would be appropriate for me to order you to let Sampson and me know.

MR. HAFER: I'll let you know now. We're not going to change it, Your Honor. We're going to keep doing what we've

been doing voluntarily.

THE COURT: All right. But I may just put that in there.

MR. HAFER: That's fine.

THE COURT: It's 11:30. We're going to take a short break, in part for the stenographer, and resume with the motion to dismiss for the failure to inform the grand jury of the consequences of the special findings and other alleged misconduct before the grand jury. I expect that I'm going to
11:29 decide that matter orally today.

And then we're going to go to some discussion of the Whitney motion, which is not fully briefed, if the government wants a reply, and the related motion. And that will be it before lunch. It may be it with the government today because when we get through that, I've got the firewalled assistants coming at 1:00, I think, and I thought I would work with them this afternoon and the defense lawyers on the budget issues.

Okay. So here. We'll take a ten-minute break to 11:40. Court is in recess.

11:42 (Recess taken 11:30 a.m. to 11:42 a.m.)

THE COURT: All right. As I said, I'd like to hear your argument on the motion to dismiss for failure to inform the grand jury finding probable cause with certain factors would make Mr. Sampson eligible for the death penalty. That original argument has been supplemented with some case-specific

contentions based on the transcripts. I'd like to bifurcate the argument. So we'll give you a chance to address the, essentially, constitutional issue first.

Yesterday, I issued an order directing you to be prepared to discuss the implications of *Sparf v. United States* for this argument because it's my present view that if the Supreme Court had to discuss this issue in more than dicta, it would find for a grand jury, as it found for the jury in *Sparf*, essentially, that while the grand jury has the power to

11:44 disregard the evidence and refuse to bring a capital charge, even if probable cause for each of the necessary requirements exists, the grand jury does not have the right to bring a capital charge when the government decides to seek the death penalty and probable cause exists for each factor that makes the defendant eligible for the death penalty.

But that's my present view. I am interested in hearing from you. Who would like to speak to this for Mr. Sampson?

MR. MCDANIELS: I have that, Your Honor.

11:44 THE COURT: Thank you.

MR. MCDANIELS: In advance of the argument, I agree with dividing it into two parts. When I get to the second part, can I assume that the seal has been removed?

THE COURT: Yes. I'm sorry. I meant to address that. There's a motion to unseal, which also occurred to me, there's

not an opposition to it.

MR. HAFER: I think it's even assented to, I believe.

THE COURT: The motion to unseal is allowed. I'm sorry I didn't mention that. Okay. Mr. McDaniels.

MR. MCDANIELS: I do wish that the *Sparf* case had been a little shorter in terms of --

THE COURT: Actually, I should have put the jump cite for you.

MR. MCDANIELS: Actually, it would help me. When I

11:45 think of the *Sparf* case, I actually thought of it in a different context. It's cited in the *Gaudine* case of the Supreme Court, which is the case about materiality and mixed question of fact and law. And I've always understood the *Sparf* case to be related to what the petit jury can do and that the petit jury is required to follow the Court's instructions on the law.

THE COURT: Here. I'll tell you what I think the implications of this case are. And I know it because I've taught it. But if I wasn't working on so many things, I would

11:46 have given you a jump cite.

If you go to page 293, basically *Sparf* resolved a raging dispute, I think going back to the founding, as to whether lawyers ought to be allowed to argue for jury nullification, in effect tell the jury you don't have to follow the law as the judge described it. You can decide what the law

is. And even if you don't like the fugitive slave law, for example, you may find -- if you don't like the fugitive slave law, you can find my client not guilty notwithstanding what the judge tells you.

So that was all about juries. So I'm thinking of this analogously. My present thinking is that I should deny your motion because the jury doesn't have the right not to indict if the evidence is sufficient to establish probable cause of each of the elements, and the factors that make somebody eligible 11:47 for the death penalty procedurally are like elements; and therefore, since they don't have the right not to indict, the government has no obligation to tell them the effect of the findings they're being asked to make; and therefore, it wasn't an error not to do that in this case, and that the grand jury would -- you know, this is different than the dicta in *Vasquez* and *Campbell* but consistent with the dicta in *Branzburg* about the role of the grand jury to find probable cause, that it does provide protection. It's protection against unfounded prosecutions that could be politically motivated or -- 11:48 prosecution when there's no probable cause to believe the essential facts, but that the role of the grand jury, now at least -- and it might have been different in England or before the American Revolution -- is not to second-guess the executive's decision to devote its resources to prosecuting a case. That's my present view.

MR. MCDANIELS: Well, it won't surprise you that we respectfully disagree on that. If I could, as I understood the role of the jury, petit jury for a moment, obviously the law is now you can't argue that the jury can nullify. It has to follow the law and the instructions given by the Court. It can in fact nullify if it wants to. It could return a general verdict of not guilty in *Sparf*, if it wanted to.

THE COURT: Yes. And that's why I think there's a difference between a power and a right. To have the power -- and the grand jury has the power not to indict even if the evidence is sufficient and it would be secret and unreviewable. But I don't think the Supreme Court would find it that they have the right to do that.

In fact, actually, there's one other thing I intended to give you. We don't have the transcript of the impanelment of this grand jury as far as I know, correct? I haven't seen it.

MR. MCDANIELS: I haven't seen that, Your Honor.

THE COURT: But I can show you what the Benchbook for federal judges had as the standard for language that should be used in impaneling a grand jury. This is probably what the grand jury was told when it was selected. So we'll give you that, too. We'll make it Exhibit 1. Then I'm going to listen to you.

MR. MCDANIELS: I think the distinction is that the

grand jury does, in fact, have rights that the petit jury would not have in the sense that -- I'm not going to go through all the history, but we've shown the history from the precolonial days from the English precedence where jurors knew that it was capital or were informed that it was capital. And same thing with the juries during the period after the adoption of the amendment, the Fifth Amendment, guaranteeing the grand jury here. And you know, I don't think that, while it's dicta in each of these cases, it's not like the Supreme Court has only said it once, and it's not like it's making a light statement when it quotes in both *Campbell* and *Hillery*, the statement is very clear that the grand jury has this power.

11:51

THE COURT: But here is part of what reminded me of *Sparf*. *Campbell* at 1423 --

MR. MCDANIELS: Right.

THE COURT: -- it says, "The grand jury, like the petit jury, acts as a vital check against the wrongful exercise of power by the state and its prosecutors," and it's analogizing the grand jury or petit jury, trial jury. And I thought in *Sparf* when the Supreme Court focused on it, they said, you know, that they didn't have the power to nullify, and that what's being argued to me now is comparable to that.

11:52

MR. MCDANIELS: To go on to say, as Your Honor notes there, that not only, it says it controls not only the grand jury, the initial decision to indict but also decisions about

what to charge, how many counts to charge, including the important decision to charge a capital case and cites with approval the language from *Vasquez v.* Hillery, which is very specific to the powers of the grand jury.

And I quote from there on page 263 of *Vasquez v.* Hillery. "The grand jury does not determine only that probable cause exists to believe the defendant committed a crime or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense, numerous counts or a single count, and perhaps most significant of all, a capital offense or a non-capital offense all on the basis of the same facts. Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained."

11:53

THE COURT: And I think that's really -- I think there the Supreme Court's citing Judge Friendly's dissent.

MR. MCDANIELS: Correct.

THE COURT: I guess -- yes. My present view is that if the Supreme Court had to focus on that, it wouldn't hold that. And so because -- this is dicta, so I'm not required to follow that. I think everybody agrees on that, right?

11:54

MR. MCDANIELS: Correct.

THE COURT: As usual, I'm trying to be as transparent as possible.

MR. MCDANIELS: They said it twice. It's not like they just said it once in passing. It was reconfirmed and it's

recent. It's well long after *Sparf* that they're saying this.

THE COURT: Right. And maybe you and I are the only two people that remember *Sparf.* Even though we're not old enough to remember it, we know about it. But you have *Branzburg.* I mean, I perceive a tension between *Campbell*, *Vasquez* on one hand and *Branzburg*, also dicta. The Supreme Court writes, "The grand jury has the dual function of determining if probable cause exists and in protecting citizens against unfounded criminal prosecutions. Its task is to inquire into the existence of possible criminal prosecutions and to return only well-founded verdicts." *Branzburg*, 1972, I guess earlier than the two cases on which you're relying.

MR. MCDANIELS: I think, again, even now, the practice in the Federal Court is not consistent. I mean, we have examples of the grand jury being informed that the consequences of what they're about to do are serious. It's a capital offense.

THE COURT: That happened in *Gooch*.

MR. MCDANIELS: It happened in *Gooch*, and I think we have a couple more. It happened in the *Williams* case and also in *Diaz*. We have two other cites, Your Honor, where the grand jury was informed of the special consequences, particularly that their findings would make this case a capital case. And in this situation here in Massachusetts as well, I mean, it's not intuitive by any means to an average citizen in

Massachusetts that carjacking would be a capital offense.

And that's something that -- and we'll come to it when we talk about what was actually said there, but there was certainly no bringing home to the jurors the significance of the decision that they were making as they reviewed these special factors, what would be the consequence.

THE COURT: I agree with that. Here. Let me -- if you want to keep going, you can keep going, but I'll tell you one more thing that influences my tentative thinking. It's very important, and this relates to some of Mr. Sampson's other motions. In 1972, the death penalty was found to be unconstitutional because juries were acting with unguided discretion, the results were found to be arbitrary and capricious and, therefore, in violation of the prohibition of cruel and unusual punishment.

In 1976, in *Gregg*, the Supreme Court found that that Georgia statute provided guided discretion, and, therefore, it wasn't unconstitutional. It didn't violate the Eighth Amendment. The Federal Death Penalty Act establishes elaborate procedure to guide the discretion of juries, and that's intended to guard against, minimize, if not eliminate, arbitrary results and results based on impermissible factors such as race.

If the grand jury is permitted to do whatever it wants and to say in effect, you know, Congress and the president said

the death penalty is appropriate for some car-jackers who murder, but we disagree, it seems to me to inject an unreviewable form of potential inequality. I mean, each grand jury would decide for itself, and it could be in the south or throughout the country, they look as though, This is a white person. You know, we don't think he should be subject to the death penalty. He only killed a black person. But if it was a black person who killed a white person, the grand jury might reason differently.

11:59 So it would leave in the system, that's been so elaborately ponderously perhaps crafted by the Supreme Court, Congress and the president, a big opportunity for arbitrariness, maybe even bias.

MR. MCDANIELS: It seems to me that to inform the jury what it is about would be consistent with having a meaningful decision made by the jury, and a uniform practice would seem to be appropriate, too, since obviously some grand juries are being told it and some grand juries aren't.

THE COURT: What would be the purpose of telling them,

12:00 other than to invite them not to indict even if the evidence was sufficient if they didn't like the death penalty or they did like the defendant?

MR. MCDANIELS: One of the purposes would be to make sure that they would pay attention to the decision they're about to make. In this instance, I mean, less than ten minutes

was spent on a multitude of factors. So understanding the gravity of what is the consequence of the decision you're about to make. And also, there's always a place in the death penalty and in the federal death penalty, too, for decisions to find -- not justify, to find for reasons, mercy or otherwise, that the death penalty is not justified.

THE COURT: That exists for the trial jury. I mean, that's the ultimate question: Is it justified, after they've made certain factual findings. Why is that a role for the 12:01 grand jury rather than just finding probable cause that alleged facts exist?

MR. MCDANIELS: Well, again, what it's finding are the steppingstones. That's another motion that we have, Your Honor, that that should be part of the grand jury's decision. That's one of the motions we have here, which would be the consequence of finding that the justification decision had to be made beyond a reasonable doubt, would also be that that had to be presented to a grand jury as well.

I know that's another motion. But there is no reason 12:01 why, since it's a steppingstone and a requirement, actually, of the statute before the death penalty can be imposed, that the grand jury actually -- rather, the petit jury actually engage in that determination, then it's an element of the offense, we argue.

THE COURT: But a grand jury proceeding is just the

government. It doesn't provide the putative defendant a chance to offer evidence. The government's not required to offer exculpatory evidence, I think.

MR. MCDANIELS: That's correct.

THE COURT: The grand jury's not well-suited to do that weighing; and there's no statute, like the Federal Death Penalty Act, that gives the grand jury the responsibility or, the government will argue, the authority to do that.

MR. MCDANIELS: It's true that the role of the grand jury is not mentioned in the statute, and that's what *Ring* ended up creating as a rule of criminal procedure, essentially that certain procedures had to be followed before the grand jury to satisfy the Constitution.

So our position is that, consistently through history, the grand jury has performed a role that went beyond simply finding probable cause that included deciding whether in its decisionmaking power it thinks these charges should be brought.

I don't think there's any more I can say on that point, unless Your Honor has a question.

THE COURT: I'll just give you a chance to address this. I mean, I think this is an issue of historic importance, just the way the issue decided in *Sparf* decided an open issue that had been hotly debated.

The idea that the grand jury could refuse to indict in colonial times at the moment makes sense to me because we had

taxation without representation. The American Colonists were not represented in making the laws. They didn't have influence over who were the prosecutors. And, you know, historically in that period, it seems to me, it was a sort of principle justification for applauding the exercise of this power and maybe even calling it a right.

Now our laws are democratically made, and prosecutors represent the president who is accountable to the people. So it seems to me there's less justification for applauding the
12:04 power and a lot of risk. I mean, implicit in your argument is that, you know, the grand jury would have treated Mr. Sampson in a way that you regard as more humane, and if it had known the seriousness of what it was being asked, even if there was probable cause, they might have said, you know, I don't believe -- enough of them might have said, We just don't believe in the death penalty. Nobody should be put to death.

One, that would be disagreeing with the law that was made in Washington for the whole country; and two, you know, they might say in Boston or in Memphis, you know, The defendant
12:05 is white. He killed a black person. We don't think he should be executed, or say, He's black and he killed a white person. We do think he should be executed. And you would never know that that was their reasoning, because it's secret.

And it seems to me at the moment that undermining the laws that have been democratically made and creating this

opportunity for arbitrary or discriminatory action is not something the Courts, in the context of capital punishment, should find the grand jury has the right to do.

MR. MCDANIELS: Your Honor, I can't agree that there's no remaining need for the grand jury in the current American system of criminal justice to exercise its traditional powers. And we're talking hypothetically here now about the powers of the grand jury and not specifically about Mr. Sampson or his case. But we gave you examples in the pleadings, I mean, where

12:06 clearly, there are prosecutors and there have been prosecutions that have been vindictive prosecutions that shouldn't have been brought, and the grand jury as it stands in bulwark of freedom is what -- and I don't think that's changed just because we're here in 2015.

THE COURT: No. I think that the grand jury's role would be, today, to keep factually unfounded charges from being brought. So down in Arkansas, you know, there was the claim that Governor Seligman was being prosecuted for partisan purposes. I think he appointed some campaign contributor or

12:07 something. And, you know, if there wasn't a factual basis of, Here's the statute if the jury was properly instructed -- and this jury wasn't, grand jury wasn't in one respect -- but if they find that, you know, there's not probable cause to believe A, B or C which are elements of the offense, then they wouldn't bring the charge. But they wouldn't be second-guessing the

wisdom of a factually-founded charge.

MR. MCDANIELS: I think we covered this in the brief as well, but there are reasons now today to question because there are so many laws that are so complex that if you want to go after somebody, you can find a way to go after somebody, and it would be, quote, "probable cause," but that doesn't mean it was right.

In that role of the conscience of the community, that role of judging is the grand jury's purpose in standing between the state and the citizen. That is the purpose of its being, and I don't think that has changed because of where we are now. I mean, there are different problems than the colonial days, but there's still problems in the initiations of prosecutions.

12:08

THE COURT: In my current conception, if somebody is being prosecuted federally, you know, for possession of marijuana, which is a federal offense but not something that is commonly, if ever anymore, prosecuted in Federal Court, there should be a political check on that. You know, if they're being prosecuted because of who they are, what political party they're in, there should be a democratic political check on that.

12:09

And as a practical matter, the grand jury would have the power not to do it, but I don't know that it has the right not to do it.

MR. MCDANIELS: Again, in this instance, unlike the

jury situation, petit jury, where you're saying you can't tell the grand jury what its power is -- no one is telling this grand jury that it has the power, but it knows that it, nonetheless, has the power to do it. So it's not an invitation, but when the right case comes up, it should be free, despite the existence of probable cause, to exercise its role standing between the government and the individual and say no.

THE COURT: You haven't had a chance to read it yet, I just got it yesterday, but that excerpt from the Benchbook which was in effect in 2003 when the second superseding indictment was returned here, it doesn't have any language that I read that is consistent with the idea that the grand jury can decline to indict even if it finds probable cause.

So I just thought that ought to be out there. Although, as I say, we don't have a transcript of exactly what they're told. And I'll say two things that weigh in your favor. The Supreme Court favorably quoted Judge Wisdom in *Cox*, recognizing, treating this as a right, and Judge Friendly, and I think it's *Ciambrone*, or maybe -- in any event, you've got Judge Wisdom and Judge Friendly who are in the pantheon of judges on your side.

The Supreme Court quoted Judge Friendly, at least, and actually, when I wrote my *Ring*-related decision in 2003, I implicitly, or explicitly, shared your view because I wrote,

you know, the grand jury decides if it's permissible and appropriate to bring a capital charge.

MR. MCDANIELS: Yes. Well --

THE COURT: But I now think that I wasn't right.

MR. MCDANIELS: -- want to put you in that pantheon.

THE COURT: Anyway. Why don't I hear from Mr. Quinlivan, who has been waiting for a long time.

MR. QUINLIVAN: Thank you, Your Honor. I have several responses on the merits, and at the end I do want to argue about why I think this and several like claims should be rejected under the law of the case doctrine.

THE COURT: In fact, we can go off on that. That's another thing I may have been wrong on. I'm not sure that the law of the case doctrine applies under 2255. We're not here on a remand. My law clerks have found this. That's part of the reason I leapfrog over it.

MR. QUINLIVAN: Certainly. I'll just briefly touch on that. I'll go directly to the merits.

I think Your Honor's understanding of *Sparf* is entirely correct. And indeed, I note your analogy of the marijuana prosecutions. When the Department of Justice was litigating the medical marijuana cases in California, this issue arose time and time again. And what the courts have uniformly held is exactly what Your Honor said, that while a petit jury and a grand jury as well has the power to nullify,

it does not have that right, nor should a judge do anything that would encourage the jury or a grand jury to so --

THE COURT: What cases are those?

MR. QUINLIVAN: I'm sorry?

THE COURT: Did you cite those cases in your brief?

MR. QUINLIVAN: We did cite one of them, which is *United States v. Marcucci*, which is a Ninth Circuit decision in which one of the claims was that the Benchbook guidance -- and I'm not sure if it was the Benchbook or if it was the model federal charge.

12:13

THE COURT: I think it was -- I read the other one, the other Ninth Circuit case. I think they have a Ninth Circuit pattern charge.

MR. QUINLIVAN: Yes, that's right. There was a dissent. Judge Hawkins took the broad view that, in fact, grand juries should have this right to nullify, but the Court itself rejected that, and with good reason. And I think Your Honor has pointed several of those out.

It wouldn't, in this case, for example, be limited to the death penalty because, as we pointed out in the brief, there are any number of sentencing factors, like following the lean, for example, any fact that would trigger a mandatory minimum sentence has to be found by the grand jury or charged by the grand jury and found by a jury beyond a reasonable doubt.

12:14

THE COURT: Did your argument -- I thought you cited *Melendez*, but I may be confused, that basically no Court has found that a grand jury has to be told that a factual finding will create a mandatory minimum sentence or increase a mandatory minimum?

MR. QUINLIVAN: That's right. In fact, to the contrary, both the Benchbook and grand jury charge state is that jurors are not to concern themselves with sentencing or what any potential sentence would be. And that's consistent not only with *Branzburg* but, as we noted in our brief, with *Hamling*, in which the Supreme Court said, "Our prior cases indicate that an indictment is sufficient if it first contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend," and second, "enables him to plead an acquittal or conviction and bar prosecutions for the same offense."

THE COURT: How does that relate to the role of the grand jury?

MR. QUINLIVAN: Well, that's what Courts that have considered this specific issue have said. In this case, which isn't dicta, the Court is saying as long as the defendant is apprised of the charge against which he or she must defend himself against, that's sufficient to satisfy the grand jury clause of the Fifth Amendment. No mention is made that the grand jury must also be informed of what any potential sentence

would be.

And I would submit that *Vasquez* and *Campbell* aren't inconsistent with that because Mr. McDaniels said that what the Court said in *Campbell* is that they could choose not to charge a capital case. That's not what the Court said. *Campbell* says expressly, "but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime."

12:16 Similarly, *Vasquez* talks about, "charging a capital offense or a non-capital offense." So they're talking about charging the offense, which has capital implications and is consistent with the grand jury's traditional role that say in any murder case, it can charge first-degree murder, which might expose the defendant to a capital charge, or a lesser crime, which does not expose the defendant to a capital crime. Nothing is said about the decision whether or not to seek a particular sentence.

So again, I think that, you know, this is dicta, and I 12:17 would submit that the Supreme Court in neither of these cases was sort of resurrecting, you know, something that -- prior practices from the 18th century. And indeed I can't help but note the irony that after we've been told time and time again that, you know, with respect to the Eighth Amendment and the due process clause, you know, the defendant argues that we have

evolving standards of decency, and what the Supreme Court says in *McCleskey* in 1986 no longer holds sway, and now they seem to be born-again originalists with respect to the grand jury clause.

But it's all to say that *Vasquez* and *Campbell*, if you actually look at what the Court says, it is dicta, and they weren't saying that the grand jury has the role of deciding whether to affirm the government's decision to seek a particular sentence.

12:18 THE COURT: Well, *Vasquez* has language that's not in *Campbell*. They quote Judge Friendly's dissent and say, "Moreover the grand jury is not bound to indict in every case where a conviction can be obtained."

MR. QUINLIVAN: That's right. No, and I think that --

THE COURT: That's inconsistent with my present conception. My present view is if the grand jury has not just the power but the right not to indict when there's probable cause to believe each of the elements of the offense and the Attorney General has decided he wants an indictment, then the

12:19 grand jury would have a right to know that.

It would be a prosecutor's responsibility and a judge's in impaneling, saying, you know, You're going to be called upon to decide whether there's probable cause. If there's not probable cause for each essential element, you can't indict. Then if there is probable cause, you decide

whether it's fair. I mean, I think that's what we judges would have to be telling grand juries, and I don't believe that's what we do.

MR. QUINLIVAN: I agree entirely. And, respectfully, I don't think even this quotation from Judge Friendly suggests that outcome. He's merely -- and I think he's just merely reflecting the understanding that a grand jury has that power. But, you know, what Courts have said, the First Circuit has repeatedly, following *Sparf*, has said that Courts should do
12:20 nothing to enable a grand -- or petit jury to nullify, such as giving an instruction on nullification, such as allowing an argument in closing about nullification and indeed not even allowing an argument about how the particular sentence -- what the particular sentence might be in the hopes that the jury might acquit based on that.

I would point Your Honor to -- Judge Friendly, obviously, was from the Second Circuit. I think the Second Circuit's most powerful exegesis on this is a decision, *United States v. Thomas*. I don't have the pinpoint, but it's 116 Fed.
12:21 3d, and I'll provide the Court with the pinpoint cite. It's a decision that goes into detail about the history of nullification, the decision in *Sparf*, and why in that particular case in which the juror is actually asked a question about whether or not they could acquit based -- I believe what happened was the defense basically made a nullification

argument in the closing. Nothing was said about it. And so the jurors and the judge didn't stop him from doing it and didn't instruct the jury about it. The jurors asked the judge a question about whether or not that should be allowed, and the judge instructed the jury, no.

So yes, I would say in sum and substance, this is no different than the decisions that say that although you recognize the power, you should do nothing to empower that -- it is not a right, and you should do nothing to empower a jury from exercising it.

12:22

THE COURT: Legitimize that power --

MR. QUINLIVAN: Absolutely.

THE COURT: -- and characterize it as a right.

MR. QUINLIVAN: That's right. That's right.

And just one final point because, again, we are talking about these two decisions as being dicta, but I did want to point out, and we noted it in our brief, that there is, I think, a significant change in the language of what the Court said. Because in *Vasquez*, you know, the description of what

12:23

the power is is set off by semicolons as if they are separate and distinct powers it might have. So it's, "The decision to charge a greater offense or a lesser offense; numerous counts or a single count; perhaps most significant of all a capital offense or non-capital offense." Again, it's dicta. I don't think that that suggests the Court was distinguishing the two.

But in *Campbell*, the Court makes clear the decision to charge a capital or non-capital offense is, in fact, part of the decision to charge a greater or lesser offense. It's not something different. So I submit *Campbell* and *Vasquez* are not inconsistent with the uniform understanding that a jury does not concern itself with the potential sentence in a case.

THE COURT: Since you couldn't resist saying all of a sudden they're sounding like originalists when they argue about evolving standards of decency, I wrote about this in my August 12:24 2003 decision in this case. I believe it was the original intent of the framers of the Eighth Amendment that it would change over time. They knew that there were punishments that existed 100 years, 200 years before that were regarded as barbaric in 1787; and they foresaw that there might be continued evolution, so they didn't prohibit all punishments that were impermissible in 1787. They used broad language, like the Fourth Amendment uses, unreasonable searches and seizures, capable of growing, and therefore not collapsing. But anyway.

MR. QUINLIVAN: 12:25 No. And that's been the understanding since the -- certainly since the 1950s since, I believe it's *Weems*, where the Supreme Court expressly adopted that language.

THE COURT: My point is that I think there's more support in the text of the Eighth Amendment for using evolving standards of decency and less guidance or clarity from the

grand jury clause of the Constitution. And maybe these things are reconcilable. I mean, it is true that a grand jury would have charged carjacking in a form that would not be a capital offense if it had made different factual findings.

But I didn't get the feeling that that's what the Supreme Court was saying in *Hillery* and *Vasquez*. They were assuming the kind in dicta, the kind of power that Sampson advocates the grand jury had here and should have been told about. And at the moment, I respectfully think that if it
12:26 focused on it, particularly in the context of a capital case, the Supreme Court would not adopt what it said in *Campbell* and *Vasquez*.

MR. QUINLIVAN: And the only point I just reiterate in response, Your Honor, is, again, the language the Court used was about charging a capital crime or a capital offense. And I would suggest that that is consistent with the understanding that, yes, the jury is making that decision here, for example, whether or not the carjacking is going to be accompanied by the special findings. That's different from making the decision
12:26 whether it's appropriate in this case to seek a capital sentence.

And so, you know, again, it's dicta. I think everyone's trying to read a little too much into what -- you know, the Supreme Court clearly wasn't intending to issue a broad pronouncement, but I would suggest that the language

itself, talking about charging a capital crime or offense, isn't inconsistent with the current practice at all.

THE COURT: Because they have to make the factual finding.

MR. QUINLIVAN: That's right. That's right. And the words "sentence" -- you know, or whether it's appropriate to seek a capital sentence, isn't in those decisions.

THE COURT: Okay. All right. Thank you.

MR. MCDANIELS: Just briefly, Your Honor. One thing

12:27 to respond to the argument of the parsing of the language making it a lesser offense. With the indictment that was presented to this grand jury, they could have decided to come back with Counts One and Two and not the special factors, and they would have made it a lesser offense, life imprisonment only at that point. So they would have made that decision if they knew the consequences of these findings and had that as part of their decisionmaking.

Also, I mean, we'll come to that at a later part. There's no indication in this regard that they made any of

12:28 these determinations, absolutely none, but we'll come to that in the second part.

The second part is, originalists maybe, but we cited on pages 3 to 5 and onward in our reply to the government's response to the supplemental memo a number of cases, modern cases that reiterate the power of the grand jury. And I

understand we're making a distinction here between a power and a right, but I'm not sure how that distinction makes -- because for Judge Wisdom to say in 1965 that, quote, "It has the unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce 12 or more jurors to give sanctuary to the guilty." I mean, that's saying that they have the power, despite probable cause, to return a no bill.

THE COURT: And he would have been very familiar with
12:29 that power because it was being exercised very much by state juries and probably grand juries in the segregated south, and, you know, this is part of what he and his colleagues were contending with.

And I mean, I am engaged by the idea that he thought that was legitimate. Although, I haven't studied *Cox*, but with as much humility as I'm capable of, really delving into this, I don't think the Supreme Court would now say what -- the most obvious meaning of *Vasquez* and *Campbell*. And maybe Judge Wisdom and Judge Friendly would have a different view now, too.

12:30 Here. Let me explain myself.

MR. MCDANIELS: Sure. We appreciate Your Honor's time.

THE COURT: It's a serious issue. I'm denying the original motion to dismiss for failure to inform the grand jury that finding probable cause for certain factors would make the

defendant eligible for the death penalty.

In essence, I find that the grand jury has the power to disregard the evidence and refuse to bring a capital charge even if probable cause exists. The grand jury does not, however, have the right not to bring a capital charge when the government seeks the death penalty and probable cause exists regarding each factor or sufficient factors that make the defendant eligible for the death penalty.

This issue exists or has been raised and taken seriously in meaningful measure because of the dicta in *Campbell v. Louisiana*, 532 U.S. 392 at 398, and *Vasquez v. Hillery*, 474, U.S. 254 at 263.

12:31

Campbell involved the practice of excluding blacks in selection of grand jury forepersons. In dicta, the Supreme Court wrote, "The grand jury, like the petit jury, acts as a vital check against the wrongful exercise of power by the state and its prosecutors. It controls not only the initial decision to indict but also significant decisions such as how many counts to charge and whether to charge a greater or lesser

12:32

offense, including the important decision to charge a capital crime."

In *Vasquez*, which involved the systematic exclusions of blacks from the grand jury, the Supreme Court said essentially the same and added that, "The grand jury is not bound to indict in every case where a conviction can be

obtained." That's 474 U.S. at 263.

The dicta in *Campbell* and *Vasquez* describes the role of the grand jury differently than the dicta in *Branzburg v. Hayes*, 408 U.S. 665 at 686 and 688, a case involving whether a newsman had a privilege not to disclose a confidential source to the grand jury.

In *Branzburg*, the Supreme Court wrote, "The grand jury has the dual function of determining if probable cause exists and of protecting citizens against unfounded criminal prosecutions. Its task is to inquire into the existence of possible criminal prosecutions and to return only well-founded indictments."

I have not been given the transcript of the instructions given to the grand jury that returned the second superseding indictment in this case in 2003, nor have I been given the oath that those grand jurors took. However, I have marked as Exhibit 1 the version of the Benchbook for United States District Court Judges that was in effect in 2003. It's the fourth edition with the March 2000 revisions. That it is, in my view, likely that the grand jury was instructed consistent with that Benchbook. It's the practice of many judges in my experience.

The Benchbook charge in part states that the grand jury should be told, "Your task is to determine whether the government's evidence is sufficient to conclude there is

probable cause to believe that the accused is guilty of the offense charged, that is, whether the evidence presented to you is sufficiently strong to cause a reasonable person to believe that the accused is probably guilty of the offense charged." Then later, it says, "While you would perform a disservice if you did not indict where the evidence justifies an indictment, you would violate your oath if you merely rubber-stamped indictments brought before you by government representatives." That's on page 210, where judges were advised to inform grand juries, "You would perform a disservice if you did not indict where the evidence justifies an indictment."

12:36

This charge, which, in essence, directs a grand jury to indict if the evidence creates probable cause for each element of an offense, is consistent with the definition of the role of the grand jury in the dicta in *Branzburg* that I quoted. "It does not inform the grand jury that it has the right to disagree with the executive's decision to prosecute if probable cause exists. The role of the grand jury as defined in *Branzburg* protects citizens from factually unfounded charges that could be motivated by bias, prejudice or partisan purpose. Like a petit jury, a grand jury has the power to refuse to issue an indictment even if the evidence establishes probable cause for the element of it."

12:36

As I wrote in *Sampson*, 245 F. Supp. 2d, 327 at 333, "After *Ring*, the intent and aggravating factors requirements of

the Federal Death Penalty Act must now be treated procedurally as elements of the offense. A grand jury could ignore the evidence and refuse to find probable cause for facts that make a defendant eligible for the death penalty. In this sense, it has the power to refuse to issue a well-founded indictment. The petit jury has a similar power not to convict, even if the evidence proves each essential element beyond a reasonable doubt."

However in *Sparf v. United States*, 156 U.S. 51 at 102 to 103, in 1895 the Supreme Court found that, "While a petit jury has the power to disregard a judge's statement of the law and find a defendant not guilty, even if under the judge's instructions he had been proven guilty beyond a reasonable doubt, the jury did not have the right to do that."

I note that *Sparf* resolved a question that had raged for a century concerning whether jury nullification was lawful. For example, in a fugitive slave law case in this jurisdiction, *United States v. Morris*, prosecution against a black attorney for his alleged part in a rescue attempt, Richard Daner and John Hale argued that the jury should be instructed that it could independently decide both the law and the facts.

Then Judge Benjamin Curtis not only refused to give any such discretion to the jury, he explicitly charged them that their moral responsibility was to make every conscientious effort to apply the law as charged by the judge to the facts as

found by themselves. He stressed that power is not a right, and the mere fact that there was no easy to way to pierce a general verdict of acquittal in no sense gave the jury a right to render such verdict contrary to the law charged by the judge. That's a quote from Robert Cover's Justice Accused at 191, quoting *United States v. Morris*, 26 FCAS 1323, 1331 to 36.

This is, of course, the charge the district judges routinely and rightly, after *Sparf*, give to juries in every case. That is, they must follow the law as the judge describes it, regardless of whether they agree with it.

Sparf was a capital case. The Supreme Court held that where the evidence proved the commission of the crime charged, it was proper to instruct that the jury could not convict the defendant of a lesser included offense. That's at page 115, perhaps. The Supreme Court reasoned in *Sparf* that, "Public and private safety alike would be in peril if the principle be established that juries in criminal cases may of right disregard the law as expounded to them by the Court and become a law unto themselves." That's page 102.

It noted that, "Permitting disregard for the laws declared by the Court would undermine the equal protection of the law and cause our government to cease to be a government of laws and become a government of men." That's page 103.

I now find respectfully that despite the dicta in *Vasquez* and *Campbell*, the Supreme Court now would find that the

grand jury has the power but does not have the right not to indict if the government presents a capital charge and the evidence established probable cause for every essential element of it.

As I said in sentencing Sampson to be executed in 2003, "The people's representatives in Washington democratically decided that the death penalty is appropriate for some defendants who commit the offense of carjacking resulting in murder." That's 300 F. Supp. 2d at 278.

12:41 "If the grand jury" -- "If there was an obligation to tell the grand jury that certain factual findings would make a defendant eligible for the death penalty would invite the grand jury to question the wisdom of that law and nullify it if it was found by a sufficient number of grand jurors to be unwise."

As the Ninth Circuit wrote in *Navarro-Vargas,* 408 F. 3d 1184 at 1203, "The prospect of a grand jury here and there deciding for itself that the law lacked wisdom is an invitation to lawlessness and something less than equal protection of the laws."

12:42 I find that it would be particularly intolerable with regard to capital cases, that is, finding that the grand jury has this right to nullify, in effect. In *Furman*, 408 U.S. 238 in 1972, the Supreme Court found that, "The unguided discretion of juries resulted in the arbitrary imposition of death sentences and therefore constituted cruel and unusual

punishment in violation of the Eighth Amendment."

Four years later, in *Gregg*, 428 U.S. 153, the Supreme Court decided that, "A statute providing for guided discretion by jurors in deciding whether to impose a death penalty was constitutional. The FDPA is such a statute creating elaborate standards and procedures for petit jurors where that petit juror must follow in deciding whether to impose a death sentence. Among other things, it prohibits jurors from being influenced by race as provided in 18 U.S.C., Section 3593 F."

12:44 If it were held that the grand jury had a right to refuse to find facts that would make a person eligible for the death penalty, despite the existence of probable cause to support them, and therefore a right to be told that their factual findings would determine if a putative defendant would be eligible to be executed, their discretion would be unguided. There would be a great risk that their decisions would be influenced by impermissible consideration such as race. Because deliberations of a grand jury are secret, the exercise of that discretion would be unreviewable, and a system

12:44 carefully calibrated to eliminate arbitrary results would be undermined.

Prior to the Constitution's adoption in 1787, in England and the American Colonies, the grand jury may have been regarded as having the right as well as the power to refuse to return a factually well-founded indictment. Before the

American Revolution, at least, colonists were not represented in making the laws or in selecting those charged with enforcing them. Thus, there was therefore a rationale for such a right. However, as the eminent constitutional historian Mark DeWolfe Howe wrote in 1939 regarding juries, "It is arguable that such a right loses its importance when a statute is the enactment of a truly democratic legislature. This is equally true of a grand jury."

Every Federal Court that has decided the issue, including two in the District of Massachusetts, has held that it is not an error for the government to not tell a grand jury that certain factual findings will make a defendant eligible for the death penalty. In most of those cases, the Courts reason that the government is not required to tell the grand jury that certain factual findings will make a defendant eligible for the death penalty because the grand jury's proper role was to determine if there is probable cause for those proposed findings.

Those cases include two in this district, *United States v. Green*, 372 F. Supp. 2d, 168 at 184, note 27, and Judge O'Toole's more recent decision in *Tsarnaev*. Other districts that have decided this question and reached the same conclusion, or other district courts, are those in *Sanders*, *Savage*, *Williams*, *McCleskey*, *Jacques*, *Aquart*, *Cruz-Ramirez*, *Troya*, *Williams*, *Green;* in Kentucky, *Duncan*, *O'Reilly*, *Talik*,

Lecco, Williams. In Hawaii, *Diaz, Batson, Rodriguez, Haynes* and *Matthews*.

I now concur in this conclusion and note that, to my knowledge, the government is correct when it argues that no Court has held that the grand jury must be told that a factual finding will make the defendant subject to a mandatory minimum or a higher mandatory minimum.

So that's my reasoning.

And it's now quarter to 1:00. I think it would be
12:48 useful to hear your argument now on the other grand jury related issues and then break for lunch, if we do get this concluded before 1:30, when I think the cafeteria will close. But why don't I hear your argument.

MR. MCDANIELS: Thank you, Your Honor. The background to this argument is that in June of 2002, the Supreme Court decided *Ring,* and in light of that decision, on August 5 of 2002, Mr. Sampson sought to withdraw his previously entered not guilty plea and enter a guilty plea to the indictment that at that time would not have qualified for the death penalty.
12:49 Three days later, the grand jury was convened. The Court did not grant that motion then. The grand jury --

THE COURT: Excuse me.

MR. MCDANIELS: -- convened to address the *Ring* issue.

THE COURT: Wait one second. I want to get the grand jury transcript. You're fired. Sorry. They're working very

hard. They get confused when I re-organize the files.

MR. MCDANIELS: The position we have, Your Honor, and this is based on the record of the grand jury that has now been produced, the grand jury, just as Your Honor read from the instructions, not to be a rubber stamp for the government, had no choice here but to -- and as a result was a rubber stamp for an indictment that was drawn and presented by the government.

We say that because, first of all, the grand jury met on this case for under two hours to consider it. They heard
12:51 the testimony from a single witness in person, who they heard excerpts of the confession by Mr. Sampson, and they were presented at the very end of that presentation at 11:48 with 14 transcripts of prior grand jury testimony that prior grand juries heard and told they could read it if they wanted to but practically -- at the end of that, there was further instruction on the law by the government, and then the deliberation, which could not have occurred -- the deliberation could not have occurred any more than ten minutes.

And what they had to do to follow the instructions
12:51 that were involved was to make findings regarding these special factors, the aggravating factors and intent factors, the statutory aggravating factors and these intent factors in the act. And for that decision to be made as to Mr. McCloskey, there were eight separate factors that had to be found, four intent factors and four other statutory aggravating factors.

For Mr. Rizzo, there were another seven that had to be found, four intent and three of the statutory aggravating factors. That's 15 determinations. It's just impossible that they were made individually in the time allowed.

So given that, it's understandable where the jury ended up, given the way the case was presented to them and the statements that were made along the way. I mean, we certainly have set forth a law that the defendant is entitled under the Fifth Amendment to an independent grand jury, one that really 12:52 makes the decision, not simply a rubber stamp, and that has due process and Eighth Amendment implications as well in the death penalty case.

So when you look at how the government presented this to the grand jury, they minimized what the grand jury was about. It's not that they just didn't tell them that what they were doing was finding factors that would make this case capital, but they never ever mentioned that they were finding, quote, "aggravating factors." There was never any indication that the findings that they were making was to make this a more 12:53 serious case, a more blameworthy case, a case that carries more weight to it.

In fact, they indicated that the only reason that we were here was that the law had been changed slightly; that it's a relatively straightforward matter, and it's not really complicated. And they told the grand jury that two prior grand

juries had already looked at the matter. So they never gave any indication of the consequences of these findings.

THE COURT: Well, two things. One, they told them -- I'm looking at page 5 of the transcript. We'll get a copy and make it Exhibit 2 of this proceeding. They said, "There was a new Supreme Court case that changed the law slightly and, as a result, it's the opinion of the Department of Justice and the people of Washington that we have to ask you to rule on certain factors at the end of the indictment." So they were telling them that those factors were the new part, drawing their attention to the factors.

MR. MCDANIELS: What I hear is, "Washington is making us do this, but it's really not a big deal. Two other grand juries have heard this matter. We got to be here and do this." That's what I hear in this. What the grand jury heard then is --

THE COURT: Hold on just a second. Go ahead.

MR. MCDANIELS: So in the grand jury -- the prior grand juries that considered this obviously considered over 300 pages, 350 pages of transcript of testimony of eyewitnesses. There's no way that this grand jury that was supposed to be making an independent decision on these 15 factors considered any of that testimony. Could not have, impossible. They got it at 10 minutes of 12:00, and after that, there was instructions by Mr. Vien.

THE COURT: I suppose you would understandably argue that this is no excuse, it's been a long time, more than -- well, 30 years since I've been in a grand jury. But with superseding indictments, I think it is customary to just give them everything that went before, have somebody summarize it and tell them they can delve as deeply into it or not as they want to. So maybe that's no excuse if it's inadequate. This is just one of the rare cases where, for appropriate reasons, I found the grand jury transcript.

12:56 MR. MCDANIELS: The difference here, Your Honor, I mean, it really wasn't accurate to say the two prior grand juries had considered this because this was the only grand jury to be considering the 15 special factors, aggravating factors or intent factors. No other grand jury had been called upon to consider those, so that was all new.

And these are not simple. Some of them, by far, took up a lot of time and the Court's time to figure out substantial planning, the cruel and heinous, and even the fact that these two crimes were part of a single criminal act, which they later

12:57 turned out --

THE COURT: With regard to substantial premeditation and substantial planning, based on what I ultimately instructed -- and I wrote about this in the August 2004 decision -- the instruction here was incorrect. And in fact -- I've written a lot. It's hard to remember it. I don't know.

MR. MCDANIELS: The problem --

THE COURT: No. You want to hear this. It helps you, but it's also going to focus because in my current conception, they made an error. If you look at *Sampson* 335, 166, beginning at 209, I found and instructed the jury that there had to be substantial planning and substantial premeditation to seriously injure or kill a particular person.

The instruction here just told them they have to find there was substantial premeditation and planning concerning the carjacking, stealing each particular car. So my present view is that was erroneous.

Then I went on, I'm reminded, to find that the evidence was insufficient to prove that factor beyond a reasonable doubt with regard to Mr. McCloskey, not with regard to Mr. Rizzo. And I set aside, I believe, the jury's verdict on that finding.

So with regard to that particular point, which you seem to be going by, I believe there was an error made, it's possible, in what the instruction was. It's possible that the evidence might have been insufficient to prove something beyond a reasonable doubt but would have been sufficient to establish probable cause.

In fact, that's my current tentative view. And therefore, this was a harmless error, because we haven't talked about the standards yet, but I think the *Bank of Nova Scotia*

standard is the right one here. The errors you're arguing at the moment do not appear to me to be structural as the courts have defined them, like excluding blacks from the grand jury, and therefore you have to show prejudice that the decision to indict was likely to have been affected by the error. But I do think that the government made an error here.

MR. MCDANIELS: I didn't mean to go by it. It was my next one on my list.

THE COURT: All right.

01:00 MR. MCDANIELS: Because really, this was compounded in several ways relating to substantial planning regarding Mr. McCloskey. When the question was asked of Trooper Cooke -- one of the grand jurors was confused about the rope and whether the rope had been used in both the case of Mr. Rizzo and the case of Mr. McCloskey, which goes to, the rope has obviously been used by the government as evidence of substantial planning, and we know that it was not used with respect to Mr. McCloskey. And not only --

THE COURT: But I think it was used with regard to

01:00 Mr. Whitney, and that's why they heard some evidence of it, but they hadn't been told about the Whitney murder. It hasn't been pointed out to them.

MR. MCDANIELS: Correct. And the juror wanted clarification of that. He said, "Did he use it in these two murders that we're considering?" And the trooper was not able

to answer the question, which Your Honor just gave the answer. The trooper certainly knew as well. But he wasn't allowed to answer that. The government instructed that the grand juror should use his own memory. And what's more, specifically said, "Confine your deliberations to the carjacking presented today." Told the jurors specifically to confine their deliberations to the carjacking.

And like Your Honor said, later when they described substantial planning, it was described in terms of planning the carjacking. That's what Mr. Vien told the grand jury. "Did he plan the carjacking?" And then finally, the jury was told -- and they asked a question, "Is this all or nothing?" And they were told, "Yes," that this is all or nothing.

But it's not all or nothing. And we just got through talking about all the things the grand jury could do, including finding one or more of these -- when you look at that --

THE COURT: Let me stop there. There is that "all or nothing" language, but there's also a statement -- you know, generally speaking with regard to trial juries, errors in a particular statement are assessed in the context of everything the jurors were told. They're not looked at in isolation in determining whether the error was prejudicial. And in this case, with regard to the all or nothing, which is on page 14, at the outset, the Assistant U.S. Attorney told the grand jury that it had to rule on certain factors at the end of the

indictment, that's on 5, and asked the grand jury to, "Give it a fresh look and make your decision whether or not there is probable cause to believe he did those things, and those special factors exist at the end."

So my tentative thought is this was a grand jury that evidently wasn't hearing its first case. And things that I read were correct, that they should take "a fresh look and make your decision whether or not there is probable cause to believe he did those things and those special factors exist at the end." So if the right standard is prejudice, that error at the end, if it was an error, I don't know that I have great doubt that it influenced the decision to bring the charge.

MR. MCDANIELS: Your Honor, in the record that you have here, how can one have any satisfaction that they considered these special factors? I mean, you look at what the instruction was, consider the carjacking, when you look at what they came back with, the question, the only question they came back with, in probably ten minutes they had to decide what they were going to do had to do, with the VIN number that is part of the carjacking offense in Counts One and Two, not in the special factors at all.

I mean, it's a physical impossibility for them to have considered these 15 and really thought about any of them and certainly the ones that have a lot of complexity to them in the time they had allowed. I mean, if I see a grand jury being

told, Hey, two grand juries have looked at this, not a complicated matter. It's a simple statute. Just focus on the carjacking. These are just some factors, a slight change in the law -- *Ring* was not really a slight change in the law but a slight change in the law -- it was all to minimize what we were doing here.

And the grand jury got it, and they came back in less than ten minutes with an indictment. That could not be anything other than saying, Oh, yeah, okay, rubber stamp. And that's not what they were supposed to do. They were supposed to think about and talk about and deliberate on 15 factors.

THE COURT: But assuming without deciding all of that is right and they dealt with it quickly because of what the government said, why should I doubt that if the matter had been more fully explained to them and they spent hours or days looking at the evidence, they wouldn't have returned this indictment?

MR. MCDANIELS: First of all, as Your Honor noted a moment ago, our position is that the denial of an independent grand jury, which this, we submit, indisputably was because the grand jury didn't really act on these and could not have acted on these factors, is a structural error and that we're not required to demonstrate prejudice.

THE COURT: But the courts have defined structural errors as errors that, for example, that involve denial of

counsel. Or I think in *Vasquez* and *Campbell, the* exclusion of blacks would have been a structural error. This I think doesn't go to the structure of the grand jury. It goes to the way this particular grand jury performed, properly constituted, following all the formalities -- not formalities -- requirements of Rule 6, performed under the direction of these prosecutors. It doesn't strike me as structural.

MR. MCDANIELS: Well, under our position -- what I can see here, it was a nullity. That's why it's structural because there can be no confidence whatsoever that they considered every one of these 15 separate findings they had to make based on the record of time they had and what they did with that time based on the question they had and consistent with the instructions they were given.

We obviously agree that the Supreme Court has not extended at this point a structural error to the grand jury, but it's not decided otherwise either, and at least Justice Scalia would find a denial of an independent grand jury to be a structural error.

01:07 01:08

THE COURT: What does Scalia --

MR. MCDANIELS: That was in his dissent. It was citing his decision in *Neder* as well. Just a second. I thought I could find it.

THE COURT: Here. Why don't I -- is there more you'd like to say? We can get Justice Scalia's decision later.

MR. MCDANIELS: *United States v. Resendiz-Ponce*, 549 U.S. 102 at 116-17, 2007. So even -- you know, that's on the one hand.

Beyond that, it seems to me that in terms of seriously affecting the decision to indict, the standard, even beyond if it's constitutional error, it would be the Chapman Standard, beyond a reasonable doubt. Even in the lowest of the standards, I don't think there can be any question that the way it was presented affected the quality of the decision because they couldn't have reviewed the very things that they were supposed to be determining.

And, you know, when you say, Your Honor -- I mean, I don't know what would happen if they paid serious attention to substantial planning, for example. As Your Honor pointed out, you didn't find it. They had a question about it. They were told, essentially, look at the carjacking.

THE COURT: But that wouldn't have made -- let's say that was taken out. Mr. Sampson still would have been eligible for the death penalty with regard to Mr. McCloskey because of the other findings.

MR. MCDANIELS: If they made those findings, yes.

THE COURT: You mean if they properly made them?

MR. MCDANIELS: Correct.

THE COURT: Okay. Thank you. What does the government say about this?

MR. QUINLIVAN: Your Honor, to begin with, I think you are entirely correct that just as after a trial, a case of instructional error would look at the entirety of the instructions given. I think what the defendant has done here is basically take out isolated phrases that are completely divorced from the entire context of the instructions given.

And let me just begin, because with respect to the suggestion that the government underemphasized or that the grand jury wasn't put on notice that it had to make the findings as to each one of those special factors, in fact, as we noted in our brief, on at least ten separate occasions during the instructions, the government -- in different phraseology but the effect was the same -- is to inform the grand jury that it had to make findings as to these claims.

And I'll just point to a few that you've already highlighted. On pages 2 to 3, the government says, "And so we're going to present evidence about, you know, about those, and then there are a number of statutory factors that we also have to ask you to rule on about how the crimes were committed."

A page later, the government tells the jury that he's going to "tell you what the law is," "and then, as I said, some special factors at the end that we're asking you to rule on."

The next page, again, the question is asked about whether it's a superseding indictment. He explains it's

actually a second superseding indictment, that because of a Supreme Court decision, it's the opinion of the Department of Justice and people in Washington that this has to be done, quote, "that we have to ask you to rule on certain factors at the end of the indictment." "So, just give a fresh look and make your decision whether or not there's probable cause to believe that he did those things and these special factors exist at the end." Page 10, "And then we're asking you to make some special findings as well." And then the description is made --

01:13

THE COURT: Hold on a second. Where --

MR. QUINLIVAN: I'm sorry. On Page 10, right in the middle.

THE COURT: Line 13. Go ahead.

MR. QUINLIVAN: Yes. And then going on with the description as to several of the special findings, again, it's repeated that, you know, "Here is some of the evidence that you may consider. It's up to you to make that finding or not." So there's no possible way that the grand jury in this case didn't

01:14

think that it had to rule on the special findings.

And with respect to the all or nothing comment, I note that this wasn't introduced by the government in this case. It was a question from one of the grand jurors.

THE COURT: How does that help you?

MR. QUINLIVAN: Just in the sense that I think it just

reflected -- it reflected how, as we noted in the brief, how grand jury practice typically works, in the sense that the government oftentimes will say, We're giving you a completed indictment for you to review. If you have any problems or concerns with it, come back to us. And that's --

THE COURT: Yeah.

MR. QUINLIVAN: Again, after saying, Yes, it's an all or nothing indictment, you know, the government then says, But if you have any questions, concerns, et cetera, I'm just outside the door.

THE COURT: But wouldn't it have been a more accurate and clear response to say, You need to find probable cause for each of the following things, and if you don't, we'll take that out of the indictment, and the defendant will still be charged?

MR. QUINLIVAN: Yeah. I can't disagree with that. I mean, obviously, in retrospect, you know, that would probably have been a more accurate statement. But, you know, all or nothing -- people understand what all or nothing means. It means unless you find everything, you find nothing.

THE COURT: Which conveys the impression -- this is the defendant's argument -- that Mr. Sampson would walk, go free if they didn't find everything.

MR. QUINLIVAN: I would suggest that that -- I mean, I think the defendant's argument is now morphing from the government engaged in instructional error to the grand jury

violated their oaths in this case.

THE COURT: Well, does that make a difference?

MR. QUINLIVAN: Yeah, I think it does because at bottom, this is a claim that -- well, two points. First off, this is a claim, or at least as initially briefed, it was a claim that the grand jury was improperly instructed. Now it seems to be a claim that, well, even if, even if they had been told repeatedly that they had to rule on these special findings, and even if the common sense understanding of all or
01:16 nothing is that unless you find everything, you find nothing, there's the risk that the grand jury, given the horror that they had heard about what the defendant has committed, that they thought he would go free and, therefore, they violated their oath. That is not tied to any of the instructional claims that the defendant is making, I would submit. Because again, consistent with the idea, again, that they had been told repeatedly that, We're asking you to rule on these special findings, I'd say anyone's understanding of the term "all or nothing" is, again, unless you find everything, you find
01:17 nothing.

I want to go to a couple of points on some of the other claims.

THE COURT: It's now 1:15.

MR. QUINLIVAN: Sure.

THE COURT: I think the cafeteria closes at 1:30.

We're going to stop. Please come back at 2:30 because I have to do a little further work to prepare on some of the other issues.

We'll do this. We'll have some discussion of the CVRA issue and the latest filing by the defendant, and then I'll work with the firewalls.

Okay. Court is in recess.

(Recess taken 1:17 p.m. to 2:52 p.m.)

THE COURT: I apologize for the delay in starting, but
02:52 I've been reading some additional cases concerning the matter you were just arguing. Mr. Quinlivan, is there more you would like to say?

MR. QUINLIVAN: Yeah, a couple more points on some of the other issues, Your Honor.

Just briefly, the allegation that the government barred Trooper Cooke from answering questions, all the government said was that it's the juror's recollection of the testimony that controls. The jury had the CD with the defendant -- with Mr. Sampson's confession that it could play.
02:52 That's no different from the instruction that this Court and other courts give, you know, when a juror comes back with a question, for example, asks for a transcript, so there's nothing erroneous or improper about that.

And I point out that this particular -- I just want to touch briefly on the law of the case because this issue arose

in the transcript of Trooper Cooke's testimony that the defendant has had since the beginning of this case. This isn't related to the other claims where they only recently got this instruction.

So this absolutely is the kind of issue that they could have and should have raised back in 2003. And I'm not going to spend a lot of time belaboring the point, but I do think that, you know, these issues are ones that should have been raised back then and that this Court, I think, does need

02:53 to resolve the law of the case issue because I think it's an important one that's going to affect not just this issue but several others that we may be confronting as this case goes on.

THE COURT: Well, my thinking may be evolving on the proper standards, and I'll explain my evolving thinking at some point, but I don't think this is the best time.

MR. QUINLIVAN: Certainly. I do want, on the substantial and planning and premeditation, I do want to go to that because I respectfully disagree. The government properly instructed the jury with respect to that issue, and I think --

02:54 and I would suggest consistent with Your Honor's decision in that case.

So as Your Honor correctly pointed out in that decision, it requires, that statutory factor requires first off that you intended to cause the death of a particular person, not just any person. And secondarily, it's not the underlying

crime that makes it death-eligible that you look at. It's not substantial planning and premeditation to commit the carjacking but rather the death of Mr. McCloskey and Mr. Rizzo. And that's exactly what the government, in fact, instructed in this case.

And I point Your Honor to page 12 of the instructions. And this is -- I think it's important to point out first, if you look at the very end, page 11 of the instructions, that's where the government sets out that there are a set of factors
02:55 enumerated regarding the McCloskey indictment. So all of the factors that he thereafter is setting out are referring specifically to Mr. McCloskey. So this isn't just the death of any person, generally, but it's referring specifically to Mr. McCloskey.

Then we go on to page 12. "B, the defendant, Gary Lee Sampson, committed the offense charged in Count One after substantial planning and premeditation to cause the death of a person."

THE COURT: Not so fast, particularly on this part
02:56 because this is the part that is, in my view, wrong.

MR. QUINLIVAN: Okay. Well --

THE COURT: But go ahead. Read it. Just read it slowly, so she can write it down accurately.

MR. QUINLIVAN: Certainly. "B, the defendant, Gary Lee Sampson, committed the offense charged in Count One, after

substantial planning and premeditation to cause the death of a person. If you find that there's evidence that he thought about what he was doing, he was going to car-jack, what he was doing all along, preparing himself for it." So the second sentence is simply modifying the first sentence that sets out the standard.

He's saying the carjacking is one of the things you can look to, not the only thing, one of the things you can look to to determine that he engaged in substantial planning and premeditation to cause the death of a person.

And Your Honor, that's made all the more clear when you look at the similar instruction with respect to Mr. Rizzo. And there we're talking about page 13 to 14. And I'll quote, "The defendant, Gary Lee Sampson, committed the offense after substantial planning and premeditation to cause the death of a person. He arranged at will and planned to car-jack the situation and have the bug spray. It's up to you to find these factors, but I'm just pointing to some bits of evidence that you may want to consider in your deliberations on that."

So two points are key there. One, the last sentence, he's expressly -- the prosecutor is expressly saying these are just some bits of evidence that would support the statutory aggravating factor, which is planning and premeditation to cause the death of a person.

And secondly --

THE COURT: Substantial planning and substantial premeditation.

MR. QUINLIVAN: Substantial planning, that's right.

In addition, Your Honor, there the prosecutor doesn't simply reference the carjacking, but he references the bug spray. And as Your Honor is well aware, because that's one of the factors you found supported the factor in this case, the bug spray in this case wasn't used in any sense to car-jack Mr. Rizzo. It was used to kill -- in the course of killing Mr. Rizzo.

So again, the reference to carjacking in both of those instructions is simply an example of evidence that the jury could look to to find the aggravating factor, which is substantial planning and premeditation to cause the death of a person. And indeed, Your Honor, I would note that the defendant in his reply brief doesn't even respond to our argument on this claim, which I think underscores why it lacks merit.

And, in fact, the only way that the defendant in his opening brief is able to make the claim is by admitting that key first sentence in the quoted language. The quotation goes straight to the carjacking but it omits again the central point, which is substantial planning and premeditation to cause the death of a person. So I would submit there is no and there was no error in this particular instruction.

In any event, Your Honor, as yourself noted, it certainly would be harmless with respect to Mr. McCloskey, given Your Honor's finding.

THE COURT: Well, this is down the line, but people should make a mental or actual note. The government should think about this, whether this aggravating factor with regard to Mr. McCloskey should be struck from the indictment. In other words, the government has said it's going to be the same evidence again, and I found that the evidence was insufficient last time.

It's not anything to be resolved now, but just something to think about or maybe you'll get a motion to strike. But I think that even without that allegation -- I said this earlier -- the findings are sufficient to make Mr. Sampson death-eligible with regard to the carjacking resulting in the murder of Mr. McCloskey, right?

MR. QUINLIVAN: Right, right.

THE COURT: All right. Mr. McDaniels, is there anything further you'd like to say?

MR. MCDANIELS: Very briefly, Your Honor, on that point. On page 13 of our brief we quoted the first and the second sentence. I think the thrust of what the government did there in focusing the jury on the carjacking, "planning of the carjacking," everything was the carjacking, including telling them to "confine your deliberations to the carjacking that we

are presenting today," and combining that with the minimization of what these special factors were, the result of which is, I think, even in the lowest standard, did this substantially influence the decision to return the indictment, I think the record is clear that what most of the grand jury did was focus on the carjacking and could not have focused on the special factors. And for that reason we think that the special factors, Your Honor, should be dismissed.

THE COURT: Let me give you a chance to address this before I decide this motion.

03:02

In my current conception, whether something had a substantial influence on the decision -- well, whether there's a substantial question as to whether the indictment would have been returned to me relates to the sufficiency of the evidence. In other words, let's say there's an error, and I continue to think this instruction with regard to Mr. McCloskey, and probably in the context of all of it, was an error, but if the grand jury was properly instructed the way I instructed the jury and it had taken its time, as much time as it wanted to have delved into the evidence, there would have been ample evidence to find probable cause.

03:03

So in that sense -- or if this allegation with regard to Mr. McCloskey was eliminated, he still would have been properly -- Mr. Sampson would have been properly subject to the death penalty with regard to Mr. McCloskey.

So it seems to me there's no prejudice, even if there's an error, because had the government not erroneously stated the law, the jury would have come to the same conclusion.

Do you want to be heard on that view of prejudice being linked to the sufficiency of the evidence?

MR. MCDANIELS: The prejudice I think that we have asserted here is that this grand jury proceeding, to the extent it was to decide the aggravating factors and the intent factors, was a nullity as to Mr. Sampson. Because the grand jury did not make that decision. They rubber-stamped what was presented to the government. At best and at most, they focused on the carjacking, Counts One and Two, and not the special factors shown by the question they raised.

Certainly, if they had done -- if they had looked at the 14 volumes of the past grand jury, if they had actually discussed -- I'm not saying there wasn't evidence that could have supported those. But what I think we have on this record is clear evidence that they did not do that, could not have done it. It was physically impossible to do that in the less than ten minutes they had to deliberate and given what they came back with during those ten minutes of a question confined to Counts One and Two about the VIN number and jurisdiction.

So our position is that that's why this is a structural error, because it deprived Mr. Sampson of one step

in the process. And certainly the way it was presented led to the result of the grand jury doing just what they were told to do, focus on the carjacking but not on the special factors.

THE COURT: Do you want to be heard on that?

MR. QUINLIVAN: I do, Your Honor. A couple of points. First off, I don't know where this ten minutes comes from because it is a little difficult to -- you have to go back and forth between the transcripts. But this ten minutes is just made -- it's clear that there was somewhere between 27 -- we

03:06 don't know exactly how long the grand jury deliberated. What we do know, let me point out, in the instructional -- we know from the instructions that the proceedings began at 10:11 and that Trooper Cooke testified after the initial instructions by the government until approximately 11:15 a.m. We know that the government played the CD and that, following less than a page of comments, that matter was concluded at 11:48. So probably an entire half an hour of the proceeding was the grand jury listening to Mr. Sampson's confession in his own words. So that's 11:48.

03:07 We then have, from pages 6 to 15 of the instructional transcript, the government giving instructions. The grand jury retires to deliberate. They come back with a question. The prosecutor goes on for several more pages with the instruction about the carjacking, and at 12:15 it's concluded. So we don't know what the precise time was that the grand jury deliberated.

It may have been 20 minutes, it might have been 15. We don't know. What we do know is that, in addition to Trooper Cooke's testimony, the grand jury listened to the defendant confess his crimes for half an hour.

So I would suggest that when you look at that evidence in addition to, as we noted, the government telling the grand jury time and time again that they had to rule on the special findings, I would suggest that there's no merit whatsoever to the suggestion that the grand jury here simply rubber-stamped
03:08 the superseding indictment in this case.

MR. MCDANIELS: I do have the times, Your Honor, if that is important.

THE COURT: Go ahead.

MR. MCDANIELS: I think it's clear that, first of all, the CD was 20 to -- 20 minutes, but the key point is that Trooper Cooke finished his testimony at 11:48. Then as seen from Exhibit 1, there are several pages of instructions that the government gave to the grand jury after that which I think took about -- we know that the grand jury began at 10:11 and
03:08 Trooper Cooke didn't begin until 10:21, and there were fewer pages there that took up ten minutes. So it's clear that from 11:48 until noon, there was instructions given; and at noon they went out and they came back with a question about the VIN number and transportation. So at the most it was ten minutes for them to do their work.

THE COURT: All right. It's rare that defense counsel and the Court get to read the transcript of the grand jury proceedings, including instructions. It was justified in this case, as I've decided and explained previously.

The matter was presented to the grand jury in a summary way, and the instructions were not careful in the manner of jury instructions. And in one respect, as I'll explain, not correct, but given the applicable standard, standards, I'm denying the motion to dismiss based on the individual and cumulative contentions that the grand jury lacked its usual -- or the required independence, and maybe the jurisprudence reflects an evolution in the -- well, whatever it is, the standard is that usually a Court may not dismiss an indictment unless an error of prejudice to the defendant, as the First Circuit says in *Lopez-Matias*, 522 F.3d 150 at 154 in 2008.

Before that, in 2006, in *Goodrich*, 448 F.3d 45 at 50, the First Circuit explained, "The circumstances in which an indictment will be dismissed are very rare, even when there's not been a petit jury verdict of conviction." It stated that "Where a defendant seeks dismissal of an indictment before there is a petit jury verdict, such relief is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict or if there's grave doubt that the decision to indict was free from the

substantial influence of such violations." That's *Bank of Nova Scotia*. Further, "An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits." That's *Costello*.

Similarly, Rule 52(a) provides that any error that does not affect substantial rights must be disregarded. However, the defendant would not have to prove prejudice if a structural protection of the grand jury has been so compromised
03:12 that the proceeding is fundamentally unfair. The Georgetown Law Journal 43rd Annual Review of Criminal Procedure 2014 on page 293, discusses this principle and cites cases. It says that, "An indictment may be dismissed for presumed prejudice when the structural protections of the grand jury have been so compromised to render the proceedings fundamentally unfair. For example, by racial discrimination, gender discrimination or history of prosecutorial misconduct that is systemic and pervasive," and it cites cases for that proposition.

Lopez-Matias at 154 also discussed the different
03:13 standard for a structural violation. In *Davila*, 133 Supreme Court 2139 at 2149, the Supreme Court indicated that "a structural violation would be something like a denial of counsel during a trial," focusing on juries; and I would say as we were discussing earlier, the exclusion of blacks from the grand jury in *Vasquez* and *Campbell* was a structural violation.

The errors alleged here, individually and cumulatively, are not structural. Therefore, Sampson must prove prejudice to prevail. Prejudice, as I said under the *Bank of Nova Scotia* standard referenced by the First Circuit, involves whether the violation causes grave doubt regarding the grand jury's decision to indict.

In this case, I find that the Assistant United States Attorney made an error in instructing on the aggravating factor of substantial planning and premeditation. Generally speaking, the First Circuit has said the government is not required to instruct on the law. It could have just read the statute. That's *Lopez-Lopez* 282 F.3d 1 at 9.

However, the prosecutor does have a duty not to provide a misleading instruction regarding the law. So, for example, in *Larrazolo*, L-a-r-r-a-z-o-l-o, the Third Circuit wrote, "The prosecutor has no duty to outline all of the elements of conspiracy so long as the instructions given are not flagrantly misleading or so long as all the elements are at least implied. "Erroneous grand jury instructions do not automatically invalidate an otherwise proper grand jury indictment. "Appellants must show the conduct of the prosecutor is so flagrant it deceived the grand jury in a significant way, infringing on their ability to exercise independent judgment."

Under the criteria stated in *Nova Scotia*, "The alleged

error in grand jury instructions is not structural nor historically pervasive and thus does not rise to constitutional error giving a presumption of prejudice to defendant," citing *Nova Scotia*. Therefore, under the rule in Nova Scotia, this Court cannot reverse the trial court in the absence of actual prejudice to the defendant."

In this case, as I said, the Assistant United States Attorney made an error with regard to instructing on substantial planning and premeditation with regard to Mr. McCloskey at least. The instruction on page 12, "The defendant, Gary Lee Sampson, committed the offense charged in Count One, after substantial planning and premeditation to cause the death of a person. If you find there's evidence that he thought about what he was doing, he was going to car-jack, what he was doing all along, preparing himself for it." I think that would reasonably be understood by a juror to mean that the grand jury only had to find that there was substantial planning and premeditation about the carjacking, not about the murder, or about the murder of Mr. McCloskey particularly.

I think that the discussion of Mr. Rizzo and that particular factor is not comparably infirm, although it's still not clear. The prosecutor said, "Gary Lee Sampson," in effect, "must have committed the offense after substantial planning and premeditation to cause the death of a person. He arranged it well and planned to car-jack the situation and have the bug

spray. It's up to you to find these factors, but I'm only pointing to some bits of evidence that you may want to consider in your deliberations on that." I addressed the proper instruction in *Sampson* 335 F. Supp. 2d, 166 at 209 et seq. the charge of substantial planning and premeditation to cause the death of Mr. McCloskey and Mr. Rizzo. I held that the government had to prove substantial planning and premeditation to cause the death of Mr. McCloskey particularly and Mr. Rizzo particularly. I explained that substantial premeditation to car-jack would not be enough. The jury found both proven beyond a reasonable doubt. The flawed jury found both proven beyond a reasonable doubt. I found that the evidence was sufficient to prove beyond a reasonable doubt the substantial planning and premeditation concerning Mr. Rizzo but not Mr. McCloskey. That's at pages 211 and following.

I found that the evidence was sufficient to prove premeditation and planning concerning Mr. McCloskey but not sufficient to prove substantial planning and substantial premeditation. In these circumstances, I held that the evidence was sufficient -- well, in these circumstances, I find that the evidence was sufficient to provide probable cause regarding substantial planning and premeditation with regard to Mr. McCloskey.

The instruction, as I say, was incorrect. And my view of prejudice in this circumstance essentially is that if the

instruction had been given correctly, the grand jury would have indicted. There was ample evidence to find probable cause, although not proof beyond a reasonable doubt eventually, and therefore, I don't have a grave doubt that the government's error improperly impacted the decision to indict. I'm interpreting that as meaning if there's a proper instruction, would the evidence have been adequate assuming -- well, would the evidence have been adequate to find probable cause, or was the grand jury improperly led into returning an indictment that was not factually founded that should not have had to be tested by a jury?

03:23

Another important claim that Mr. Sampson makes is that on page 14 of the August 8, 2002 transcript concerning the instructions, the juror asked, "Is it an all or nothing indictment?" The prosecutor answered, "Yes."

This may have -- well, this arguably suggested that the defendant could not have been charged at all if the jury didn't find probable cause for every alleged aggravating factor. That would have been an erroneous understanding. However, with regard to jury instructions, and I believe also grand jury instructions, they must be viewed as a whole to see if they adequately informed the grand jurors of their role.

03:24

The grand jurors, as I understand it, in part based on the Benchbook which I made Exhibit 1 earlier today, had been instructed at the outset of their service, their job was to

find probable cause. The concept of looking at jury instructions as a whole is familiar, but it's in *Brown*, 669 F.3d at 29, *Troy*, 18 F.3d at 33, two First Circuit's cases.

As I said, the grand jury, I expect or understand, was instructed, when it was impaneled, its job was to find probable cause for each of the facts alleged. In connection with this transcript, in these instructions, on August 8, 2002, at the outset, the prosecutor on page 3 said, in part, "There are a number of statutory factors which we also have to ask you to rule on about how this crime was committed."

On page 4, the prosecutor said, "We'll ask you to vote on the proposed indictments which will be in two counts: one count relating to each carjacking, each murder is one count. And then, as I said, some special factors at the end that we're asking you to rule." On page 5, he reiterated that, "We have to ask you to rule on certain factors at the end of the indictment." He also on page 5 told the grand jury to, "Just give it a fresh look and you make your decision whether or not there's probable cause to believe that he did those things and these special factors at the end."

There are, I think, some other examples that the government cited today, but in balance, I find that an experienced grand jury, instructed by a judge when impaneled and being told all the things it was told by the prosecutor on August 8, 2002, would not misunderstand that probable cause was

required for each aggravating factor to be included in the indictment. The grand jury was told on page 15 that it could ask the prosecutors questions. No questions were asked about this matter.

I don't find that in this context, telling the jurors that it was an all-or-nothing indictment was an error, and in any event, the error became harmless.

I also find that there was no error in failing to explain the importance of the special factors. This is related to my ruling earlier that the grand jury did not have the right not to bring capital charges if there was probable cause to support the factors that made Mr. Sampson eligible for the death penalty.

I also find it is not in error to tell the grand jury it was being asked to return a second superseding indictment. There was a lot of evidence presented to prior grand juries that was made available to it. It would have been confusing and perhaps misleading to not tell them that prior grand juries had acted on this and there had been a change in the law that brought the prosecutors back to seek a second superseding indictment.

As I said, grand jurors were asked to take a fresh look. The grand jury may not have taken a lot -- not have taken much time in reaching its decision. And the whole proceeding was relatively brief, and arguably casual, given the

momentous consequences, but it hasn't been proven to me that the grand jury was rushed by the government. There's no evidence in the transcript of this, and I understand that it's the defendant's argument that the individual deficiencies are cumulative, that this is organic, and the grand jury was a rubber stamp. But the particular matters that are charged as errors either are not errors or are harmless errors. And others might define prejudice or understand prejudice somewhat differently, but I find if this grand jury had been properly
03:30 instructed and even if it knew that this was a potential capital case and it looked at all the evidence, it would have found probable cause for every one of the allegations in the indictment, including that Mr. McCloskey died after substantial planning and premeditation even if there wasn't enough evidence to prove that beyond a reasonable doubt.

All right. I'd like to move to some discussion, although I think not complete argument, on the government's motion to allow victim impact evidence from the family of Robert Eli Whitney and Sampson's response to that and the
03:32 related motion. So the government's motion to allow victim impact evidence from Mr. Whitney's family was filed on February 3. There was no affidavit in support of it as required by local Rule 7.1(b)(1). The opposition was filed yesterday on February 17. I had previously given the government an opportunity until February 25 to reply.

Yesterday, February 17, the defendant filed a motion for leave to file a motion asking the Court to correct the defendant's sentence and sentence him to life in prison or less. That's October number 1805, the motion for leave to file is required by my December 23, 2014 memorandum and order explained at page 19, and the December 26, 2014 order regarding scheduling. In essence, given all of the poorly conceived and presented motions, constitutional motions, which have caused a lot of confusion and delay to this point, I took the unusual, I think for me unprecedented, step of requiring Sampson's counsel to ask permission to file substantive motions so there can be some attention paid to whether they were appropriate.

03:33

The opposition to the motion relating to whether the Whitneys have rights under the Crime Victim Rights Act at pages 28 to 42 discusses the issue of whether the Court should sentence Mr. Sampson to less than death. It is something that has the effect but not the purpose of someone circumventing December orders.

My tentative thoughts are as follows: I would like to hear argument on the CVRA motion after I receive a reply, or if there's no reply, after I have a chance to study this. The response just came in yesterday. That doesn't have to be in the very far future.

03:34

It may be appropriate that I require compliance with local Rule 7.1(b)(1) and have the government file an affidavit

from a representative of the Whitney family. Section 3771(d) allows an attorney for the government to assert the rights of a victim as defined in Section 3771(a). A key issue with regard to this motion, although I haven't studied it, is whether the Whitneys are victims as defined in the Crime Victim Rights Act.

The February 15, 2013 Boston Herald -- I meant to bring copies, but I think I didn't -- quoted or reported Mr. Whitney's son as saying he's not sure if he wants to testify in this case. And it reports the United States 03:35 Attorney's Office as saying the motion was filed on behalf of prosecutors without a request of the family.

This motion raises another interesting issue, but there really should be, in effect, a case of controversy concerning it, is my tentative view. So that's one matter to discuss today.

The motion for leave to file does not contain the certificate by local Rule 7.1(a)(2) that the parties have conferred in an attempt in good faith to resolve the dispute. This is significant. In the usual case, the District Court 03:36 here is justified in rejecting a motion if it doesn't represent that that conference has occurred. This one does not represent that conference has occurred. Many other motions do. I didn't see that certificate on this one.

And it seems to me that considerations of comity make it particularly appropriate to require a conference here.

Decisions to prosecute, decisions to sustain this as a capital case are generally for the executive branch to make. I do recognize, I've pointed out previously that I do have certain equitable authority given the particular posture of this case. But decisions whether to prosecute are generally for the executive branch to make. Despite having more than a year to do so and being given several deadlines, as far as I know, Mr. Sampson has never gone to the Department of Justice to seek de-authorization unless this has happened recently and nobody told me.

03:38

But the motion is seeking essentially the same relief. And putting aside whatever equitable authority I may have, it seems to me particularly important that probably not just the U.S. Attorney but the Department of Justice decide this. If Mr. Sampson really doesn't want to go to trial, which is actually an open question in my mind, the argument that I looked at quickly on those 14 pages of the opposition to the motion relating to the Whitneys and the three pages requesting leave look to me like arguments that ought to be presented to the Department of Justice and, to the extent that they're ever ripe to be presented to me, that Mr. Sampson should be here for the argument to make sure this is what that -- that he agrees with the request.

03:39

But basically, we've been operating for about a year and a half on the understanding that this case needed to be

prepared for trial, and it's still my understanding. And with regard to this motion, requirement of a conference that exists with regard to every motion filed in a criminal case in this court is important.

I'm sorry. Did the parties confer on this?

MS. RECER: Yes, Your Honor, we did.

THE COURT: Excuse me if I overlooked it. Let me see where that is.

MS. RECER: The certificate isn't in the motion for leave. I was following the order of things that were supposed to be in the motion for leave. I thought that was sort of a separate proceeding. It's not the actual motion. It's just the motion for leave.

THE COURT: It's a motion. It's a motion. Local Rule 7.1 applies to every motion.

MS. RECER: We did confer and we actually --

THE COURT: You conferred with the U.S. Attorney?

MS. RECER: We didn't confer as to the motion for leave to file it. We asked them to join us in the motion and received a response.

MR. HAFER: Can I give you the history, Your Honor? Would you like the history? Here's the history. This is important.

THE COURT: It's very important.

MR. HAFER: First off, you're exactly correct, pages

28 to 43 are a de-authorization presentation camouflaged as a motion for relief in the court. No, they have not made a de-authorization presentation; and no, they did not confer the motion for leave to file.

And it's particularly disturbing because when we want to file a motion, the conferrals have become incredibly arduous the other way because Mrs. Recer is constantly telling us that the rule requires good faith effort to narrow and resolve and discuss issues. And as you saw from the certification that we put in the Whitney motion, we conferred that thing for like an hour. We missed calls and we had e-mails. It was time-consuming.

THE COURT: But it's important. This is nobody's -- well, it's not your first case in the District Court. These conferences, when they're conducted in good faith, frequently narrow issues -- eliminate issues, narrow issues, and then permit the Court to focus on things that are genuinely in dispute and decide them on an informed basis.

MR. HAFER: Correct. And so what happened here is they sent us a number of weeks ago a proposal, whereby we would agree to make a joint motion to you to correct Sampson's sentence.

And in this proposal, they included a lot of things, frankly, Your Honor, which were deeply, deeply upsetting. And we shared these, we shared this proposal with the families.

They included things like, "If we agree to this proposal, Mr. Sampson will retract some of the particularly inflammatory things he has said in the last 12 years in connection with this case." And we were reading this thing and frankly stunned that it would take -- we would have to give them something to get him to do something like that.

They said in this proposal that if we didn't agree to it, they might have to challenge the conviction now. And in fact, Your Honor, that's in pages 28 to 43 that if we don't join this proposal, they still have two live 2255 issues that go to the integrity of the conviction, and they're going to raise those.

This is extortion. This isn't an attempt to resolve the case. And to put in here -- look, Mrs. Recer, Mr. Burt, they've devoted their careers to ending the death penalty. That's fine. But what's not fine is to publicly file pleadings in which they proclaim that what they're doing is to help the families. They're giving the families what they really want but what the families don't know that they actually want.

03:43 We got their proposal. We presented it to the families. They were -- I'm not even going to use in open court some of the words that were used by various members of all the families in response to this proposal. They weren't positive.

We responded we won't be joining you in the motion. Beyond that, there was no conferral on this particular thing.

We think you should deny it. As you said, it can be denied under 7.1(a)(2), but it can be denied substantively. Even if you have the authority -- we certainly don't think you have the authority. Even if you have the authority, you have a case or controversy, as you've noted, concerns of comity and the executive branch's prerogative, and were pursuing a sentence here that we believe is the just sentence based on the facts of this case. And that's what we're pursuing.

And the notion that they're looking out for the families, again, we don't begrudge them looking out for their client. That's what they do. That's what they've devoted their careers to. That's fine. But similar to what I said earlier, what we do begrudge is pretending that they're looking out for the families, and they're not. They have said many times in court that they want to do what is right and they want to make it less painful. Well, that something that they can do to make it less painful is to stop making it seem like that's their motivation.

Their motivation is to get Sampson off, and their motivation is guerrilla warfare against the death penalty. That's what's going on. And that's fine. That's fine. But that's what it is.

And so no, the motion wasn't conferred. With respect to 7.1(b)(1), no one from The Herald called me. No one from my office talked to me about the inquires made by The Herald.

What I will say in open court is that we did consult with the Whitney family prior to filing that motion, and I don't think that an affidavit is required. We obviously consulted with them before we filed the motion, and I represent that in open court.

THE COURT: There was some discussion, maybe it was conferring, but the fundamental point remains.

Do you want to be heard on this, Ms. Recer? Because I -- well, I'm going to say a couple things. Not to heighten
03:46 everybody's -- when I was compelled to vacate Vincent Ferrara's sentence in his 2255 because of prosecutorial misconduct and was affirmed by the Court of Appeals, or eventually was affirmed by the Court of Appeals, I vacated his sentence. The government agreed that the case couldn't be tried 15 years after he was sentenced. And then the question was should he get the same 22-year sentence that he agreed to as a result of the prosecutorial misconduct for a lesser sentence, and I decided he should get a lesser sentence. He was released, and that was affirmed on appeal.

03:46 So such authority may exist. I haven't even read -- I haven't even read what they wrote. I just glanced at it, 28 to 42. But, you know, I do believe that there's value to the process if it's regarded as necessary, even though ultimately there may be some futility to the whole thing. That's the defendant's argument, if I understand it. They arguably

believe that Mr. Sampson's life expectancy is limited and the duration of this case is unlimited, like every other capital case.

And in fact, as I got into this and looked at the *Roane* case, there seems to be a de facto moratorium on the death penalty. The Department of Justice keeps agreeing to a stay while it works on protocol to execute people. Maybe someday there will be a different administration in the Department of Justice.

03:48 But what would you like to say, Ms. Recer? But, you know, have you gone to the Department of Justice in Washington to make this argument? And if not, and this isn't the end of the inquiry, why shouldn't I say you have to do at least that before I decide whether to let you file this motion?

MS. RECER: Yes, Your Honor. Couple of points.

We have not gone to the DOJ, and we wrote -- and when we discussed this with the government, I believe it's also in the motion, we specifically said we wanted to raise this motion before going to the DOJ. And there's two reasons.

03:49 First of all, the presentation to the DOJ for de-authorization is on the issues that the DOJ asked to hear about in a particular memo. But secondly, the whole idea of this correction of sentence is the Court's authority to, in these proceedings for equitable reasons and not to -- the idea is that if we were to go to DOJ and persuade them, that they

would be giving in. And my feeling and assessment of the situation is, as the Court just pointed out, there is a de facto moratorium. In fact, Mr. Holder announced last night at the National Press Club that he thinks a national moratorium would be appropriate for the death penalty nationwide in all jurisdictions until the Supreme Court rules.

The writing is on the wall in terms of changing standards of decency. There have been two more states, since the last time we argued that motion, that have had moratoriums, 03:50 Pennsylvania, and Maryland cleaned off what was left of their row. So I believe that the situation we're in is perfect and exactly what equitable authority is for. And that is that we're trapped in the situation where it is absolutely not realistic to think that Mr. Sampson could ever be executed, because of his health, because even if the federal death penalty were to pick up right now, he would be in line behind people that have been waiting for more than 20 years, and he is not going to live that long, because changing standards of decency means the death penalty is not going to live that long.

03:50 So what is happening is a proceeding that we have heard and we really have heard the expression over and over about how painful and difficult this is. We're not presuming that we can speak for anyone. It's what has been said. And we believe it. I'm sure that this is awful, to put people through the hard part when they're not going to get a benefit, but who

can back down at this point? Who can say we're going to stand down? The judge can do that for the parties, but the parties haven't -- so the idea was to ask the Court to -- either jointly to ask the Court to have a hearing to assess what the equities and the proposal is that a lot of the equities, things that really matter to people, are not the legal questions; and the things that really matter, people aren't allowed to talk about because they don't fit in the narrow parameters.

The reason this came up in response to the motion regarding the CVRA is that our position is that we think that the consequence of these legal rules, the real effect on the family, we agree that they shouldn't be treated differently, but that's the way the death penalty works. And that's what's so awful about it. It's parsing murders and ranking them and saying which is worse. And we do agree that that has consequences for people that it shouldn't and that it's awful for them.

And it does logically raise the question of what are we doing to have these proceedings where the defense and Mr. Sampson is getting all of the care and the extraordinary process and resources because he's a capital defendant, which is absolutely appropriate. And the Court has been extraordinarily careful about that, and that's exactly as it should be, except for the fact that it's completely unrealistic to think he would ever be executed.

So I think that we wanted to propose to the Court, and this is a very serious motion and something we have actually consulted with folks who are experts on procedural issues and 2255 to make sure we're right about the way it would work. We've done a lot of research about it, and it is a way that the Court can exercise authority that is exactly for a circumstance like this, where the parsing of the law and the legal remedies and legal procedures are not going to help anybody, but the Court could create a circumstance in which people got to have a
03:53 proceeding that did address the issues that really do matter to them.

And that is the proposal. It's not extortion. The issues that remain in Mr. Sampson's case do remain, and they will be litigated. But it is saying realistically, everything that's wrong with these proceedings, everything that has been cited as painful and insulting, are things that could stop and we could have a different kind of proceeding. And that's what the motion is about.

THE COURT: A different -- okay. What kind of
03:53 proceeding?

MS. RECER: A proceeding where to correct the sentence is about the equities. What are the equities? The equities about people's real interests and the issues that matter to them. So that people, the families of the victims as well as surviving victims could talk without it being subjected to all

the rules about it being victim impact and without having to worry that if they say something in court or to a newspaper they might mess up the case. And that's not fair. For them to be able to say what really matters to them and --

THE COURT: And I always hesitate to ask these questions because I don't think they're for me now.

Okay. It's an equitable proceeding so the judge decides. Would the judge have the authority to sentence Mr. Sampson to death?

03:54 MS. RECER: No.

THE COURT: No.

MS. RECER: I mean, the only way the death sentence can happen is in a proceeding where the death sentence would happen. But the point is, here we're going to go through all that where everybody is muzzled, there's tight rules, and it's not ever going to happen.

THE COURT: I've asked you this before, although perhaps not in a public session. A, whatever argument you're making now you could have made a year ago. And we're down the

03:55 track toward the trial that I think everybody contemplated after the remand from the First Circuit. I believe I've asked this question before. I've certainly discerned it.

But B, I don't understand. You say everybody's locked in, and yet, you've never gone to the Department of Justice in Washington to make any kind of presentation at all, as far as I

know. Mr. Warbel has said, I believe, although it may not have been in public session -- well, I think it was -- the door is open, and if you come in it once and then you get something else that could be material to an adverse decision of Mr. Sampson, you can present that later.

You know, I haven't even read what you've written, and we'll get to it with the firewalls, too. Anyway. I haven't even read what you wrote on this and filed yesterday. I don't know why it had to be filed yesterday when it's obvious I'm going to be absorbed in getting ready to decide some of the issues I've just decided. But why shouldn't I say that at a minimum this isn't ripe, and you ought to go to the Department of Justice in Washington if you're not satisfied with the answer you're getting from the United States Attorney's Office?

MS. RECER: And our suggestion was that the proposal is to look at the equities where Mr. Sampson wouldn't have gotten the government to back down, so that the government never has to say, you know, this isn't a death penalty case.

THE COURT: Go talk to Mr. McDaniels. When Eric Holder came in, he inherited a case that wasn't indicted on his watch, the *Stevens* case. And he went in and he asked -- and Stevens had been convicted -- and there's no finding of prosecutorial misconduct here. That's not why we're doing this again -- but he looked at it and he said, "This case should be dismissed."

MS. RECER: I have very closely looked at the authorization and de-authorizations. As I've said before, the reason that we didn't just slap something together quickly is because there are particular issues that need to be worked up that we are investigating, and we've filed a couple of different pleadings about the need for time to be able to focus on the de-authorization. And while the government has said that they didn't have a deadline, in a de-authorization situation, sure, if you come up with some specific new facts, but they're not going to let you keep coming back.

03:58

I've been through the authorization process before, Your Honor, and people that we've consulted with have been through the de-authorization and regular authorization process, and you don't just slap something together and then supplement it later. You go in when you have a case.

THE COURT: I never even liked reading Camus. But last time I told you about Reflections on the Guillotine. Now let's go to The Plague. The Plague, if I'm remembering right, has a character in it who is trying to write the perfect book. He's coming to the end of his life, and he hasn't got the perfect first sentence done yet. I mean, you keep -- you want to perfect your de-authorization proceeding, the trial is going to be over.

03:59

MS. RECER: It's not --

THE COURT: Just listen. I don't think -- I haven't

even read this yet, but I'm disinclined to entertain this motion unless and until you've gone to the Department of Justice in Washington. You have arguments, and it strikes me that they ought to be directed, in the first instance at least, to the Department of Justice. But anyway, there's really nothing more to say on that now.

But it is -- you know, I said to Mr. Hafer I was concerned. I kind of wanted to button up whether this is what the Whitneys really wanted. I wonder whether it's what Mr. Sampson really wants, or whether Mr. Sampson, who was so anxious to get back to Terre Haute during the competency investigation that -- I want to be careful not to say anything that's not in the public record -- whether Mr. Sampson just wants to be sentenced to death again and go back to Terre Haute indefinitely until he thinks he's going to die.

Anyway. I just don't know whether there's more to say on that, except if I have any more argument on this, I may want Mr. Sampson here for it so he can hear it. And there are some other things he should see.

I'll get to -- my understanding is the government opposes the motion for leave to file.

MR. HAFER: Correct, Your Honor.

THE COURT: At the moment, I'm not ordering you to file anything else. When I look at this, if I think there should be a response, I'll give you a chance to respond to it

formally.

MR. HAFER: Thank you.

THE COURT: Everybody's got a lot to do. It's been filed, so I'm going to read it the way I always do and think about it and encourage everybody who is involved and interested in this to read it, too. But we're also going to proceed on the assumption, the understanding that there's a September 17 trial date.

Is there anything further before I let you all go and
04:02 spend some time with defense counsel and the firewalled attorneys?

MR. HAFER: No, Your Honor.

THE COURT: All right. It's 4:00. We'll resume at 4:15. We're going to resume in open court, but this has to be a closed proceeding because what's discussed with the firewalled attorneys can't go to the prosecutors and, therefore, it can't be public. We'll resume at 4:15. Court is in recess.

(Whereupon the proceedings adjourned at 4:00 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 4th day of March, 2015.

/S/ KELLY MORTELLITE

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KELLY MORTELLITE, RMR, CRR

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